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# Submission to the Senate Community Affairs Legislation Committee concerning the *Australian Charities and Not-for-profits Commission Bill 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012*

# By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

## 1 Who we are

(a) Our organisation is the Anglican Church Diocese of Sydney (the Diocese).

(b) This submission is made on behalf of the Standing Committee of the Synod of the Diocese.

(c) Our contact details are –

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## 2 Preliminary comments

(a) We are grateful for the opportunity to make submissions on the Australian Charities and Not-for-profits Commission Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (the Bill). We wish to acknowledge the considerable efforts of Treasury and Government to date in responding to various issues of concern we have previously raised in relation to the Bill.

(b) We have supported and continue to support the establishment of a national regulator for the charities and not-for-profit sector. However we consider that the regulatory framework contained in the Bill remains, in places, more far-reaching than we think is necessary while, in other places, risks not delivering on necessary reforms.

(c) In our initial submission to Treasury back in February 2011 on the *Scoping Study for a National Not-for-profit Regulator* we provided the following caution –

> "The Government must commit to a clearly identified program of harmonisation and simplification of the regulatory environment in which the sector operates and ensure that this is effectively implemented by Commonwealth agencies which interact with the sector. Corresponding commitments to reform also need to be obtained from State governments. Unless a high level of commitment to a clearly defined program of broader reform is achieved, we consider that the Government would be ill-advised to proceed down the path of establishing a NFP regulator. To do so would involve costs to both the Government and the sector not justified by any marginal benefits that might be achieved in an environment devoid of broader reform."

(d) We also made the following comments in respect of the scope of a not-for-profit (NFP) regulator –

> "Many of the activities typically undertaken by the sector, such as health-care, aged-care, welfare, education and fundraising, are already subject to a high degree of Government regulation which, in many cases, applies to government and for-profit entities undertaking the same activities. This is because such activities give rise to a level of risk to the community which already justifies a high level of regulation by relevant Government departments and agencies. Given the expertise which has been developed to manage risks associated with these activities, it is unlikely that Government departments and agencies with existing regulatory responsibilities will relinquish this role in favour of a NFP regulator. Indeed it is probably inadvisable that they do so."

(e) We concluded by suggesting that the gaps which remain for a NFP regulator to provide meaningful oversight for the sector would not be significant.

(f) The first Exposure Draft Australian Charities and Not-for-profits Commission Bill proposed a much more extensive regulatory framework than we envisaged was necessary. Many of the functions and powers of the new regulator were justified, it seemed, by the proposed object of the draft Bill, namely "to promote public trust and confidence in not-for-profit entities that provide a public benefit". We and many others strongly objected to an object in these terms, principally on the basis that public trust and confidence in the Australian NFP sector was not a matter of particular concern, significant breaches of public trust and confidence had not been demonstrated and, therefore, public trust and confidence should not be used as a primary driver for formulating the functions and powers of the ACNC.

(g) The subsequent recasting of the public trust and confidence object "to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector" (in the second Exposure Draft) and the inclusion of a further object in the Act "to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector" (in the form of Bill introduced into Parliament) were both helpful changes. However we believe that the initial and, to some extent, continuing focus on public trust and confidence has led to a Bill which, in places, remains over-engineered.

(h) We believe that important changes are still needed if the Bill is to come close to establishing a regulatory framework which will be of genuine benefit to both the sector and the broader community.

(i) The remainder of this submission outlines the areas which we believe should be addressed to achieve this outcome.

## 3 Report-once-use-often framework

(a) An important function of the ACNC, if it can be made to work, is the establishment of a report-once-use-often framework, particularly for charities which interact with multiple Government departments and agencies for funding.

(b) We acknowledge that there have been discussions with relevant Commonwealth, State and Territory agencies to determine how this function can be made to work. We also acknowledge transitional arrangements in the Bill which not only defer the commencement of financial reporting obligations until the 2013-14 financial year but also permit the ACNC to treat statements and reports already provided by existing charities to Australian government agencies as satisfying the reporting obligations to the ACNC under the Bill, at least until the 2014-15 financial year.

(c) Nonetheless, we consider that until the Government is in a position to comprehensively deliver on a report-once-use-often framework, including with State agencies, independent reporting obligations to the ACNC should be deferred, if necessary, beyond the current transitional arrangements.

(d) We also suggest that consideration be given to further limiting the financial reporting obligations under the Bill to registered entities which receive substantial funding from Government or which are endorsed as deductible gift recipients (DGR). Further limiting the

financial reporting obligations in this way would arguably achieve a better balance between the object of the Bill to maintain public trust and confidence in the sector and the recently included object of the Bill to promote the reduction of unnecessary regulatory obligations on the sector.

## 4 Governance standards and education

(a) In our submission to Treasury on the *Scoping Study for a National Not-for-profit Regulator*, we envisaged a NFP regulator providing appropriate governance education. We did not envisage a NFP framework involving mandatory governance standards. We indicated that charities and not-for-profits involved in delivering health, education, aged care and welfare services are already subject to stringent governance requirements through a range of government agencies. We suggested that the benefit of imposing further governance standards, even at a fairly low level across the sector generally would be insufficient to justify their cost.

(b) We subsequently engaged in the question of governance standards in our submission to Treasury regarding its *Review of Not-for-profit Governance Arrangements*. We believe that the decision made following that consultation process to defer until 1 July 2013 the implementation of generic governance standards for the sector was wise.

(c) We remain unconvinced that it is possible to formulate generic governance standards for the sector which go beyond statements of principle and which will add genuine value to the sector in its full diversity. Generic governance standards established as statements of principle are, in turn, unlikely to have significant beneficial community impact.

(d) We would also be concerned if any proposed governance standards were implemented by way of regulation rather than in the Bill itself.

(e) Accordingly, we suggest that the current provisions included in the Bill which contemplate the implementation of, as yet unspecified, governance standards by regulation from 1 July 2013 be removed from the Bill at this time. These provisions should be reintroduced directly into the ACNC Act if and when both the Government and the sector can reach a consensus on governance standards which will not only give effect to the object of the Bill to maintain public trust and confidence, but will also give effect to the other two objects of the Bill namely –

- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector, and
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

(f) In the meantime, we consider that the most effective way of enhancing governance across the sector and perhaps gaining a clearer sense of whether generic standards for the sector are both possible and desirable would be for the ACNC to source and disseminate across the sector appropriate information about governance in the NFP context.

## 5 Entitlement to register

(a) Another important function of the ACNC is the registration of charities in order to give them access to basic tax concessions. We are generally satisfied with the registration provisions included in the Bill.

(b) However one area of concern relates to the ongoing confusion between the purpose of an entity and the activities the entity undertakes in pursuit of that purpose in determining an entity's entitlement to register as a particular subtype of charity under section 25-5.

(c) We appreciate that some attempt has been made to address this issue through the recent inclusion of additional commentary in the Explanatory Memorandum (at 3.30). However the reference to "activities" at 3.45 of the Explanatory Memorandum is unhelpful, as is the example given at 13.79 which persists with a focus on the activities of the church, rather than its purpose, in determining whether the church would be regarded simply as a religious

subtype of charity, or whether "non-religious" activities will trigger the need for the church to register as another subtype. The point that needs to be made at 13.79 is that an incidental purpose, rather than incidental activities, will not trigger an entitlement to registration as a subtype.

(d) This issue has significant implications for a range of reasons, not least of which being that if an entity which is registered as a subtype of charity for the advancement of religion has an entitlement to register as another subtype, the entity will lose its status as a Basic Religious Charity under section 205-35(1)(c). A clear articulation of the relevance of purpose and activities in determining whether an entity is a charity will also be important when further consideration is given to replacing the common law meaning of charity with a statutory definition.

(e) If this issue is not clarified directly in the Bill, we suggest that the Explanatory Memorandum be amended to clarify the matter.

## 6 Basic Religious Charities and gift deductible funds

(a) The inclusion of the Basic Religious Charity (BRC) definition in the Bill is a welcome initiative which recognises the particular characteristics of religious entities and the challenges they face. We expect that the main types of entity that will rely on the BRC status will be local churches and parishes, although other religious charities will also qualify. These entities typically operate within and are accountable to a broader denominational community.

(b) Having included the concept of BRC in the Bill, it is important that the concept works in practice.

(c) The recent inclusion of a minimum $100,000 annual threshold for BRCs to receive Government grants without losing this status is helpful. We also accept that entities which are endorsed as DGRs as a whole, for example public benevolent institutions such as ANGLICARE, should not be regarded as BRCs.

(d) However, as currently drafted, the definition of BRC will exclude many local churches and parishes from being BRCs where such charities are endorsed as a DGR for the operation of a fund as part of their broader operations (section 205-35(3)). For example, many churches are endorsed as DGRs for the operation of a school building fund.

(e) In order to address this issue, we suggest that BRCs which are endorsed as DGRs for the operation of a fund should be subject to financial reporting and governance obligations in relation to the fund, as if the fund were a registered entity for the purposes of section 205-25 of the Bill (small, medium and large entities). This would enable the broader operations of the BRC to remain exempt from financial reporting and governance obligations.

(f) An alternative solution might be to include in the transitional provisions for the Bill a mechanism by which such funds can be readily transitioned to stand alone DGR entities with a separate ABN. For example, the transitional provisions could provide that if a BRC obtains an ABN for such a fund and notifies the ACNC of its existence within, say, 12 months of the commencement of the ACNC Act, the ACNC will register the fund as a charity on a stand-alone basis. This would avoid the need for religious entities, which have, in good faith, structured themselves with a DGR fund as part of their broader operations, from having to go through a full process of winding-up the existing fund and obtaining registration and endorsement of a new DGR fund on a stand alone basis. However in order for this solution to work, it would be necessary to determine whether the funds to be transitioned were entities in their own right (eg trusts) capable of registration.

(g) Similar notification provisions for other transitional purposes already exist in the Bill.

## 7 Facilitating interactions with large multi-entity charitable organisations

(a) There are a number of large charitable organisations, both religious and non-religious, which include groups of entities which share common governing rules. Usually there is an entity within the broader organisation which has the power to make changes to these common governing rules.

(b) An example of this is the 270 parishes of the Anglican Diocese of Sydney. Although each parish will be a separately registered charity, each shares a common set of governing rules, namely the *Parish Administration Ordinance 2008*. These rules are amended from time to time by the Synod of the Diocese. Under the Bill, as currently drafted, any change made by the Synod to the *Parish Administration Ordinance 2008* would trigger a requirement on each of our 270 parishes to notify this change to the ACNC.

(c) Paragraph 7.12 of the Explanatory Memorandum indicates that if a group of entities make changes to a common set of governing rules, it is sufficient that the ACNC is notified by one of the entities of the change affecting them all. We assume that this statement is supported by section 65-5(5) of the Bill which makes it clear that 2 or more notifications to the ACNC may be included in the same document.

(d) However, contrary to what is suggested by paragraph 7.12 of the Explanatory Memorandum and section 65-5(5) of the Bill, it would be more usual for the entity which has the power to change the common governing rules of other entities to not itself be subject to those rules. This is certainly the case for our Synod and parishes.

(e) In order to streamline interactions with the ACNC in these circumstances, we suggest that a new section 65-5(6) be included in the Bill along the following lines –

> "(6) For the purposes of paragraph (1)(d), a notification in relation to a change made to governing rules which 2 or more registered entities share in common may be made by the registered entity which has the power to make such changes."

(f) Similarly, since the accounting period for an entity will almost invariably be a matter dealt with in its governing rules, applications to the ACNC to approve a different accounting period for entities which share common governing rules would be considerably streamlined if a new section 60-85(4) is inserted in the Bill along the following lines –

> "(4) If 2 or more registered entities share common governing rules, an application to adopt such accounting period may be made, in the approved form, to the Commissioner for the Commissioner to make a decision under subsection (1), by the registered entity which has the power to make changes to such governing rules."

## 8 Responsible entities

(a) We note that, in the ordinary course, the responsible entities of an unincorporated association will be limited to the "directors" of the management committee of that entity. We believe that not extending the concept of responsible entities to include "shadow directors", as is the case under the Corporations Act, is appropriate in the NFP context.

(b) However given the diversity of structures within the NFP sector, there are a number of registered entities which are still likely to have a very substantial number of responsible entities. For example, in the context of the Synod of the Anglican Church in the Diocese of Sydney, although the 800 members of the Synod will not be regarded as responsible entities, it is likely that the members of the Standing Committee of the Synod, which comprises 60 members, would be regarded as the responsible entities for the Synod. We think that a meaningful application of the concept of "director" starts breaking down in these circumstances. We also think that the cost/benefit of a registered entity notifying the ACNC of such large numbers of responsible entities is questionable for both the registered entity and the ACNC.

(c) We are aware of other entities which are likely to have a similarly large number of responsible entities.

(d) We think it would be preferable to avoid restructuring the governance arrangements of entities which have served the sector well over a long period of time in order to achieve a more manageable number of responsible entities.

(e) Accordingly we suggest that a provision be included in the definition of responsible entity in section 205-30 of the Bill which would, on application to the ACNC, allow an agreed number of office holders within a registered entity to be treated as its responsible entities in circumstances where the number of responsible entities would otherwise exceed, say, 20.

30 August 2012