ACOSS Submission to House of Representatives Economics Committee Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills

This submission is made by ACOSS on behalf of the national COSS network:

- Australian Council of Social Service (ACOSS)
- ACT Council of Social Service (ACTCOSS)
- Council of Social Service of NSW (NCOSS)
- Northern Territory Council of Social Service (NTCOSS)
- South Australian Council of Social Service (SACOSS)
- Queensland Council of Social Service (QCOSS)
- Tasmanian Council of Social Service (TasCOSS)
- Victorian Council of Social Service (VCOSS)
- Western Australia Council of Social Service (WACOSS)

The Councils of Social Service (COSSes) are the peak bodies representing the needs and interests of service providers and their clients in the non-profit social service sector in Australia. Our members comprise community service providers, professional associations and advocacy organisations.

We provide independent and informed policy development, advice, advocacy and representation about issues facing the community services sector; a voice for all people in Australia affected by poverty and inequality; and a key coordinating and leadership role for non-profit social services across the country.

We work with our members, clients and service users, the non-profit sector, governments, departments and other relevant agencies on current, emerging and ongoing social, systemic and operational issues.

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Background

The establishment of a national regulator for community services has long been championed by ACOSS. We welcomed the Government's commitment to this reform in 2011 and have worked closely with Government and our members towards its establishment.

Throughout this reform ACOSS has assessed the merits of the ACNC Bill on the basis of three principles:

i. The ACNC's independence

ACOSS members have been unanimous in their support for this reform as the mechanism for removing the ATO from the determination of charitable status. Notwithstanding the important role the ATO plays in administering tax concessions, it was never intended (nor has it wanted) to be the sector's regulator; and the relationship between the sector and the ATO is less than positive as a result. Therefore it was regrettable that Cabinet determined to locate the ACNC within the framework of tax law and the ATO, against the sector's advice. Nevertheless there is significant scope within the Bill to ensure the independence of authority and decision-making by the ACNC and we continue to prioritise this as a key element of the legislation.

ii. The appropriateness of the ACNC legislation's scope; and
iii. Proportionality, both in terms of the charitable sector and in comparison to other regulatory frameworks.

While there have been some improvements in a number of these areas since the Exposure Draft, our submission addresses the areas in which we continue to hold a range of concerns and our recommended solutions to these problems. These recommendations fall well within the intent and purposes of the ACNC Bill and we make them in the interests of establishing the ACNC by 1 October with the sector's trust and confidence. We also refer to further detail available in our submission on the exposure draft (ACOSS 2012).[1]

Submission

1. Independence of the ACNC

While there have been some improvements to the guarantees of independence in the various iterations of the Bill over time, we continue to hold concerns about other elements of the Bill that, in our view, undermine the independence of the ACNC. Most notably these are:

- provisions that require the ACNC to report information on the sector to the ATO, such as administrative penalties, remittance and others under recognised assessment activities. While these provisions might be justified in the interests of the 'one stop shop' model, *the Bill needs to contain protections both for the sector and for the ACNC's independence*;
- the lack of safeguards to *ensure the ATO will accept the ACNC's determinations on charitable organisations*, as the ATO retains its discretion around special conditions; and
- the lack of any *power for the ACNC's Advisory Board to give advice without being requested, nor any ability to call its own meetings*. This undermines the independence, legitimacy and relevance of the body that is the key conduit of advice to the ACNC, including from and about the sector.

[1] ACOSS (2012) *Response to the Treasury Australian Charities and NFP Commission exposure draft and Governance Arrangements Consultation Paper*, Joint COSS Submission, ACOSS Paper 182.

2. Role of the ACNC in reducing unnecessary red tape

Recommendation i. The reduction of red tape should be a central Object in this Bill.

The most important question for sector organisations weighing up this reform will be the cost of the compliance burden. We acknowledge the work of both Treasury and the ACNC Implementation Taskforce engaging with state and territory governments about referral or their regulatory powers and obligations to the ACNC once established. Other possibilities include the ACNC becoming the regulator of companies limited by guarantee or of fundraising activities nationally. These developments would bring significant gains for the sector and would be greatly welcomed. However, the Bill does not yet contain any provisions that make it explicit that the reduction of unnecessary compliance and regulatory burdens is a core object of the Bill, nor does it identify these kinds of reforms as policy directions or drivers of the ACNC's purpose or activities. *There must be a direct link between the reduction of red tape and the objectives and functions of the ACNC.*

We note the following comment in the Explanatory Materials: 'During consultation with the sector stakeholders indicated that a move toward a 'report-once, use-often' approach would lead to 'huge' savings in administrative and compliance costs' (p.4). It is difficult to accept this statement on the face of the current bill and without evidence of how such predicted savings have been quantified. While ACOSS has long argued that the sector is subject to overly burdensome regulation which is both duplicatory and ineffective, it is also important to note that the 'cost' of red tape to not-for-profit organisations is also attributable to contract compliance. The current Bill does not make it clear whether the ACNC has a role in this regard.

The Government's not-for-profit reforms were announced in the context of the commitment to reduce red tape; a commitment predicated on enhancing productivity and efficiency and, most importantly for charities, effectiveness for clients. Throughout the evolution of this reform, the sector has been assured of principles such as 'light touch regulation'; and of the commitment to reduce duplication of reporting requirements and enhance the value of the reporting that is undertaken in terms of information for and about the sector. Yet these principles are not evident in the ACNC Bill. It is important that the legislation includes an explicit objective of reducing red tape. Provisions such as those at 15-10 that refer to benefits from minimising procedural requirements and duplication, or cooperation between the ACNC and other government agencies, do not provide adequate assurance that the sector will benefit from this reform.

3. Drafting of the legislation

The charitable and not-for-profit sector is marked by a large number of small organisations with very limited resources; and whose mission-based ethos often means they have no or little access to legal or policy expertise. Yet the drafting in this legislation is very far from plain English and virtually inaccessible for organisations without legal expertise. One example is in the definitions contained within the Bill. Another is the repeated use of the word 'entity' to apply to multiple actors, for example 'responsible entity', 'covered entity', and 'other entity'. To develop a reform that will impact so significantly on charities, in a language they are unlikely to understand, severely undermines the sector's capacity to support and engage with the ACNC. *For example, replacing the language of 'entity' with 'governing body' where relevant would significantly enhance the Bill's clarity and therefore accessibility to the sector to which it applies.*

One area where there has been marked improvement in the drafting of the legislation is in recognising that the sector currently holds public trust and confidence. To further the Bill's recognition of this, we recommend replacing 'improve' with 'support' in Section 10-5 (Guide to this Act), such that the clause reads as follows:

ii. *The Commissioner of the ACNC will provide information to help the public understand the work of the not-for-profit sector and to support the transparency and accountability of the sector.*

4. Definition of charity

iii. *The Bill must make clear that determinations by the ACNC will be based on the common law definition of charity, including or until a statutory definition of charity is introduced.*

ACOSS has previously welcomed the Government's policy commitment to modernise the definition of charity in Australia. It has always been understood that the reform to charity law would be pursued following the creation of the national regulator, as the ACNC. As a result, we have previously expressed our concern about setting out the common law definition of charity in the ACNC Bill, given that the table of entitlement to register (at 25-5 Entitlement to registration) would provide the first legislative basis for the definition of charity. While we understand that this is intended to refer the ACNC to the common law as the basis for the ACNC's determinations, this is not clearly stated, nor is it covered by s25-5(6).

Moreover, we urge the Committee to also highlight the importance of pursing separately the reform to modernise the definition of charity. We would be deeply concerned if the framing of the common law definition in this Bill led somehow to a departure by the Government from its commitment to modernise the definition of charity.

5. Governance standards (section 45-10)

We understand the motives behind removing the standards from the current Bill, in order to enable further engagement and consultation with the sector, and we support the stated intention to enable the ACNC to open on 1 October 2012. Nevertheless the consequence of the removal of the governance standards has been uncertainty across the sector about the implications of the legislation given the absence of the governance standards by reference to which many of the ACNC's powers will be exercised. There is not a unanimous view within our membership on how to rectify this problem: while some ACOSS members are troubled by the lack of legislative force, should the governance standards be contained in regulation; others do not want to see the governance provisions legislated at all and see the use of Regulation as a preferable option.

On the basis of these concerns, we make the following recommendations:

iv. *That the governance standards be included in the Economics Committee's inquiry, in whatever their current form.*

v. *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.*

vi. *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.* For example, the model of Consumer Affairs Victoria allows for establishment of a rule that deals with a particular issue, but leaves it up to the not-for-profit organisation how that is done.

6. Exemption

The current iteration of the Bill includes a number of exemptions that we have not seen previously, without explanation of their policy intent or value. Specifically these relate to basic religious institutions and to philanthropic ancillary trusts. Regarding basic religious institutions, we understand

that this is proposed as a 'targeted' exemption on reporting focused on religious charities that would otherwise still have to register with the ACNC. We further understand that the exemption is aimed at unincorporated religious charities that are likely to benefit from income tax exemption but not other entitlements like FBT concessions or DGR status. Given the object of the Bill is to strengthen and improve the public's trust and confidence in the charitable and not-for-profit sector, it is not clear why basic religious charities should be exempt from governance standards, particularly given that they are likely to benefit from some tax concessions, notwithstanding that they are a relatively low level of concessions available to this sector.

We are also concerned by elements of exemption from reporting and disclosure requirements for philanthropic ancillary trusts. Given the stated object of the Bill is maintaining and increasing public trust and confidence in the charitable and not-for-profit sector, the exclusion of such important parts of the sector seems ill-advised. If trusts have concerns about the release of information, the powers *the Commissioner already has to withhold information from the Register would be a better option than exempting trusts from reporting in the first place.*

In order to retain and promote confidence in the exercise of the power in the ACNC to grant exemptions, we also recommend:

vii. That any exemptions to provisions of this Bill should require justification, for example in arguing exemptions before the Parliament or in a Regulation by the relevant Minister, and the publication of reasons for any exemptions that are granted.

7. Penalties

ACOSS recognises the need to promote a culture of compliance with obligations set out in the national regulator and supports the need for appropriate consequences to flow from non-compliance. However, any consequences need to be proportionate to the act of non-compliance. We therefore question the legitimacy and administrative workability of the current penalty regime contained in the Bill. In the first instance, they are disproportionately severe for the risks presented by this sector and in relation to comparable regulatory jurisdictions. Other regulators do not have administrative penalties; they have criminal penalties which, while harsher in their potential impact, are exercised at the regulator's discretion, proportionate to the risks and impact of the act of non-compliance. In its current form, the Bill significantly increases penalties imposed for what are often fairly trivial or unintended offences.

For instance, if, after changing their constitution, a South Australian entity took 6 weeks to lodge the advice of changes with the relevant authority, it would currently face a late fee of $31.75. Under the ACNC Bill they would be liable for a penalty of $110 if they were a small organisation and up to $550 for a large organisation (Section 175-40 of the ACNC Bill). If the advice was lodged three weeks later, a small organisation would face an administrative penalty of $220, by comparison with the late fee of $66.50 currently charged by South Australian Consumer and Business Services. In other state jurisdictions there are no penalties for late lodgment. Moreover, the problem of significantly increasing such penalties would be magnified if the governance standards under the proposed Act were to include more reporting requirements. It should also be remembered that such penalties, when applied to small volunteer run organisations, not only impact on the finances of charities, but are also likely to damage morale and discourage participation of community members whose primary interest and expertise is not in corporate governance.

Even if the ACNC has discretion in the exercise of these penalties, the procedures implied by the Bill are onerous, complicated and duplicative. On the basis of the current Bill, one organisation may have a duty to update two regulatory bodies and may be subject to fines from both. For instance,

companies limited by guarantee may be subject to a system of penalties and their administration from the ACNC that duplicates (rather than replaces) that of ASIC.

While this may exist in the interim until/unless the ACNC replaces the other regulatory structure, it is unnecessary and very far from the promise of light-touch regulation to reduce red tape.

8. Procedural fairness

The Bill contains no requirement on the ACNC to inform or hear an organisation before it makes an adverse decision against that organisation. While common law obligations apply in these circumstances, this sets the ACNC Bill apart from other regulatory frameworks which specifically set out the requirements in relation to notice and procedural fairness (who can be heard and how).[2] This gives no certainty as to what processes will be followed now and into the future and undermines the sector's trust and confidence in the ACNC's processes.

9. Enforcement powers

The Bill needs to contain more adequate safeguards in the use of enforcement powers. *The sector needs to know the basis for the scope of these powers and to be assured that these powers will be exercised appropriately.*

Given the extent and potentially severe implications of these powers in the Bill, a high threshold should be required for exercising them appropriately. A key example here is the test of 'likely' in relation to non-compliance or contravention. Without knowing what non-compliance with or contravention of the Bill might look like, we are concerned by the lack of a strong threshold consistently applied to the test of 'likely'.

10. Proportionality of sanctions

The Bill needs to contain a provision that a decision of the ACNC may be stayed pending the outcome of a review or appeal. If the ACNC makes an adverse decision against a charity that results in the charity losing its tax concessions, the Bill requires those charity concessions to be suspended immediately without discretion. This means that, in the event of a successful appeal, an organisation will have suffered lost benefits even if they were unwarranted. This could be quite significant, especially where charities have difficulties operating without their tax concessions.

This is a clear departure from principles of administrative law and is without justification given the risks this power poses for charities and NFPs. It is also extremely difficult to see how this provision would be operated by the ACNC. It is not sufficient that this happens in tax law, where the ATO will repay any amounts owed at the conclusion of a matter, because lost FBT concessions (and potential loss of donations) cannot be refunded. In keeping with the principles of administrative law providing the standards for these provisions, we recommend:

viii. That the provisions that modify normal provisions be removed, leaving a discretion to the AAT or Court to decide whether to stay processes or not.

[2] See for example submissions on ACNC by the University of Melbourne Not-for-profit Project.

11. Attribution of government funding - Explanatory Materials

The EM states:

> NFP entities play a unique role in Australian society. In recognition of this important role, NFP entities are exempted from a range of regulatory requirements and are funded by governments, both directly and through tax concessions, and by donations from members of the public (1.7 at p.7).

It is misleading to attribute tax concessions to a form of funding 'by governments'. Tax concessions are attributed to society's support for charitable work, not as a form of government funding. In fact the majority of government funding to NFP entities is through contracted supplier/purchaser arrangements. This is no different to arrangements in the 'for-profit' sector, yet it would be unusual to describe these entities as government funded.

12. Importance of effective consultation

ACOSS has been concerned by the approach to consultation throughout the life of this Bill. Adequate and effective consultation must be key features of the ongoing reform work, particularly towards the establishment of best practice regulation in the not-for-profit sector. While the process since the exposure draft has been described as 'targeted' consultation, these have in fact been meetings subject to strict confidentiality requirements with a small number of sector members. This process has constrained the effort to progress the establishment of the ACNC, with the confidentiality requirements limiting the capacity for quality policy advice on the design and implications of the Bill. It has also hampered the capacity of peak bodies and others to provide clear advice to governments, based on input from their members and to work effectively with the sector broadly about the value of this reform and its implications.

We note in addition several other areas of policy development that will have a direct bearing on the functions and effect of the ACNC. These include modernising the definition of charity; and establishing new and reforming existing policy in relation to the administration of tax concessions (such as the 'in Australia' and unrelated business income tests). One of the key lessons across the spectrum of NFP reforms should be the importance and value of effective consultation in ensuring both a high degree of policy advice and in maintaining the trust and confidence of sectors that stand to be impacted upon by reform processes.