The Parliament of the Commonwealth of Australia

Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012

House of Representatives
Standing Committee on Economics

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Canberra

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Chair's foreword

The Bills will establish an independent, national regulator for the charities and not-for-profit sector. The Australian Charities and Not-for-profits Commission will become a one stop shop. Charities and not-for-profits will provide streamlined information to the Commission, which will determine their charitable status and pass on officially required data to other Commonwealth agencies, including the Tax Office. It will implement flexible, proportional regulation in accordance with entities' size and through graduated enforcement powers such as warnings and enforceable undertakings.

These Bills have been a long time coming. The current regulatory framework for the sector is fragmented, inconsistent, and uncoordinated across a range of government agencies. It meets neither the sector's needs nor those of the wider community.

A national regulator for the sector was first proposed in 2001 and has been a consistent theme in reviews of the sector since then. Charities and not-for-profits have been subject to an inefficient regulatory framework spread across many agencies and more than one level of government. The Bills offer a way to remedy this.

The sector itself supports the change. Bodies in the sector must prove their bona fides each time they deal with government, and they anticipate the day when this information is located in one easily accessible place.

Broadly, the committee covered three major policy areas in the inquiry. The first is the capacity of the Commission to reduce red tape. Work has already begun. The Commonwealth is seeking to 'turn off' any duplication, such as reports to the Australian Securities and Investments Commission or other Commonwealth agencies. It is also discussing whether States and Territories might wish to do the same with their associations legislation to the extent that these organisations are

covered by the Bills. This is a long term project, but the committee is confident that, over time, duplication will be minimised.

Some in the sector were also concerned about reporting and governance standards and how the Commission's requirements would interact with those of other State and Federal bodies. The Not-for-profit Sector Reform Council made this argument in evidence:

> Given that the government has taken on board the sector's request for further time to discuss and be consulted in relation to the reporting requirements and the governance standards, it can take on its role from day one to be engaged in those consultations about how it will implement its requirements under the legislation.

However, the Committee has made recommendations to increase the flexibility for the Commission and the sector by allowing the Commission to accept reports and materials from other agencies for a limited time, and to annex existing and sector-developed standards to the bills.

The second policy area was the liability of directors, trustees and management committees for the conduct of their organisations. Key stakeholders were very concerned about how these provisions would operate. The committee found the legislation and explanatory materials unclear and noted that at times they did not appear to match the policy intent. For the sake of clarity, the committee has recommended that these provisions should be redrafted.

The third main policy area revolved around procedural fairness. The committee has made a number of recommendations to ensure that organisations are notified and have the opportunity to respond prior to enforcement action.

There have been considerable efforts to harmonise business regulation across the country recently, and it is only fair that a similar process occurs for the charities and not-for-profits sector. The sector holds great hope that the Bills will deliver this result and the committee agrees that, with some amendments, this will occur. The Bills should pass.

On behalf of the committee, I thank the organisations that assisted the committee during the inquiry through submissions or participating in the hearings in Canberra. I also thank my colleagues on the committee for their contribution to the report.

Julie Owens MP
Chair

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Membership of the Committee

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Members	Mr Stephen Jones MP	Mr Scott Buchholz MP
	Dr Andrew Leigh MP	Ms Kelly O'Dwyer MP
		Mr Craig Thomson MP

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Terms of reference

On Thursday, 5 July 2012, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon. David Bradbury MP, referred exposure drafts of the following Bills for inquiry and report:

- 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 Minister requested that the committee report by Tuesday, 14 August 2012.

List of abbreviations

AAT	Administrative Appeals Tribunal
ACBC	Australian Catholic Bishops' Conference
ACN	Australian Charities and Not-for-profits
ACNC	Australian Charities and Not-for-profits Commission
ACNCIT	Australian Charities and Not-for-profits Commission Implementation Taskforce
ACOSS	Australian Council of Social Service
AICD	Australian Institute of Company Directors
AISNSW	Association of Independent Schools of New South Wales
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CCA	Community Council of Australia
CHA	Catholic Health Australia
CHF	Consumers Health Forum of Australia
COAG	Council of Australian Governments
Commission	The Australian Charities and Not-for-profits Commission

Commissioner	The Australian Charities and Not-for-profits Commissioner
CSA	Chartered Secretaries Australia
DPMC	Department of Prime Minister and Cabinet
Explanatory Materials	The draft Explanatory Memorandum for the Bills
GDP	gross domestic product
GIC	General Interest Charge
ICAA	Institute of Chartered Accountants in Australia
ISCA	Independent Schools Council of Australia
NCCP Act	National Credit and Consumer Protection Act
NFP	Not-for-profit
NSRC	Not-for-profit Sector Reform Council
PAF	Private ancillary fund

List of recommendations

2 Analysis of the Bills

Recommendation 1

That the objects of the Australian Charities and Not-for-profits Commission Bill 2012 explicitly include the reduction of red tape.

Recommendation 2

That the Explanatory Memorandum include material on the meaning of 'public trust and confidence' and the way that it might be interpreted.

That the guide to the Act reflect the educative and enabling role of the Commission in supporting transparency and accountability in the sector.

Recommendation 3

That the Commissioner have discretion to accept reports or material prepared for other agencies and levels of government as reports for the purpose of the reporting framework under the Bills. This arrangement should be time limited and be reviewed as the lodge-once use-often process is developed.

Recommendation 4

That the Government consider incorporating existing or sector-developed governance standards into the Bill through regulation, in addition to a default set of governance standards.

Recommendation 5

The Government investigate ways to strengthen protection in the Bills for private donors who wish to keep their philanthropy private.

Recommendation 6

The Committee recommends that Treasury redraft Division 180—Obligations, liabilities and offences, of the Australian Charities and Not-for-profits Commission Bill 2012, with a view to clarifying its intent and operation.

Recommendation 7

The Committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be amended to provide that the Commissioner provide written notice of intent, and an opportunity for the entity to be heard, before a decision is enforced to revoke the registration of an entity or suspending or remove responsible entities.

The Commissioner should be exempt from these provisions if they are satisfied that the circumstances require immediate action.

Recommendation 8

The Committee recommends that clause 40-5 of the Australian Charities and Not-for-profits Commission Bill 2012 be amended to:

- require the Commissioner to provide written notice of intent to the relevant registered entity, and an opportunity for the entity to be heard, prior to publication of the Commission's intention to publish information under clause 40-5(f); and
- allow the details of matters published on the ACNC Register under clause 40-5(f) to be removed from the register once an appropriate amount of time has elapsed, the matters in question have been resolved and there is no public interest grounds for retaining the information.

Recommendation 9

The Explanatory Memorandum to the Bills clarify that the Commissioner has a discretion not to impose an administrative penalty.

Recommendation 10

The Committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be amended to provide for a review of the legislation after it has been in operation for five years.

Recommendation 11

Subject to the recommendations in this report, the House pass the Australian Charities and Not-for-profits Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012.

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Introduction

Referral of the Bills

1.1 On 5 July 2012, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon. David Bradbury MP, referred exposure drafts of the following Bills for inquiry and report:

- the Australian Charities and Not-for-profits Commission Bill 2012; and
- the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012.

1.2 The Minister requested that the committee report by Tuesday, 14 August 2012.

Background on the sector

1.3 The not-for-profit sector plays a major role in Australian society. It comprises 600,000 entities that provide services in education, sports, welfare, arts, religion, culture and community well-being. A breakdown of the different types of entities is given on the table on the next page.

Table 1.1 Type and number of NFP entities (2008-09)

Type of entity	Number of NFPs	Number of charities
Unincorporated association	440,000	20,305
Incorporated association	136,000	22,023
Co-operative	1,850	442
Charitable trust	9,000	6,156
Indigenous Corporation	1,855 (estimate)	550
Companies limited by guarantee	12,000	4,894
Other (private companies)		2,030
Total	**600,705**	**56,400**

Source *Treasury, Submission 32, p. 6.*

1.4 The sector plays a major role in the Australian dollar-economy:

- total quantifiable Commonwealth tax expenditures in 2010-11 are estimated at $3.3 billion;
- unquantifiable Commonwealth tax expenditures are of a similar size, mainly comprising income tax exemptions;
- direct government funding to the sector in 2006-07 was approximately $25.5 billion; and
- total public donations to the sector were approximately $7.2 billion in 2006-07.[1]

1.5 Therefore, excluding where the sector charges a fee for service, it comprises $40 billion annually. Adding revenues for fee for service brings the sector up to $100 billion annually.[2] It contributes five per cent of Australia's GDP and eight per cent of employment.[3]

1.6 By definition, the sector also engages heavily with volunteers and much of its contribution to Australian society is outside the dollar economy. The estimated value of volunteer time donated to the sector in 2006-07 was $14.6 billion.[4]

1 Treasury, *Explanatory Materials,* p. 223.

2 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, p. 1.

3 Mr Paul Ronalds, DPMC, *Committee Hansard,* Canberra, 26 July 2012, p. 1.

4 Treasury, *Explanatory Materials,* p. 224.

Rationale for the Bills

Burdensome regulation

1.7 The current regulatory framework for the sector is fragmented, inconsistent, and uncoordinated across a range of government agencies. It meets neither the sector's needs nor that of the wider community. For example, a large charity limited by guarantee would provide general reports to ASIC. It would then provide individual reports to each government agency from which it received grants and contracts, which can involve substantial audit fees. It would also provide reports to the State and Territory regulators in the jurisdictions in which it was operating.[5] In evidence, ACOSS argued that these burdens arose because the system developed in an ad hoc manner.[6]

1.8 Of the 600,000 entities in the sector, approximately 440,000 of these are unincorporated organisations that fall outside the sector's regulatory framework. They do not have reporting obligations and cannot be endorsed as charities, but they can self-assess for income tax exemptions.

1.9 Around 136,000 entities are incorporated associations under State and Territory legislation. Regulatory practices in these jurisdictions have been criticised for:

- inadequate information for selecting the best form of incorporation;
- compliance costs that are not proportionate to risk; and
- passive oversight by regulators.

1.10 In general, the sector is characterised by:

- larger entities being subject to excessive regulation;
- smaller entities tending not to be properly supervised;
- no agency overseeing the sector's performance and activities;
- no agency collecting information to inform policy;
- unnecessary compliance costs with duplicated reporting, especially in the acquittal of grants; and

5 Treasury, *Explanatory Materials,* p. 223.

6 Dr Cassandra Goldie, ACOSS, *Committee Hansard,* Canberra, 26 July 2012, p. 35.

- in rare cases, poor governance practices affecting public confidence and participation in the sector.[7]

1.11 The Community Council of Australia summarised the sector's compliance burden as follows:

> The current situation is bizarre, but we have adapted to it. Because we have adapted to it, we kind of accept it. Whenever a not-for-profit wants to engage with any level of government—whether it is hiring a school hall or a local council hall, looking at their rate exemption, trying to get a payroll tax exemption, trying to register for fundraising or trying to apply for a grant from a trust or a government agency—they have to establish their bona fides. They have to say who they are and establish their charitable status. The idea that that has to be done over and over and over again is ridiculous.[8]

1.12 Five major reviews have been conducted into regulation and taxation of the sector since 2000. These were:

- the report of the inquiry into the Definition of Charities and Related Organisations (2001);
- the Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations (2008);
- the Australia's Future Tax System report (2009);
- the Productivity Commission report on Contribution of the Not-for-Profit sector (2010); and
- the Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010 (2010).

1.13 These reviews concluded that the sector's regulatory framework has added to its complexity and costs. They recommended that a single, national regulator for the sector should be established.[9]

1.14 Establishing a specific regulator for the sector would bring Australia into line with other jurisdictions such as the United Kingdom, Canada, and New Zealand. One point that came out of the hearings is that the current proposals have had a long term development and did not arise because of

7 Treasury, *Explanatory Materials,* pp. 225-32.

8 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, p. 1.

9 Treasury, *Explanatory Materials,* pp. 224-32.

a crisis within the sector, although this may have been the case overseas. Treasury stated:

> ... if we have reference to what has happened in international jurisdictions, most of the charities commissions that they have all now established were usually in response to some significant breach of public confidence. So there has been a problem that governments have then sought to resolve. And usually, of course, when problems are there you resolve them in a relatively heavy-handed sort of way. The sector's aim in this particular instance is to be a bit proactive in this and establish a regulatory framework to prevent such an occurrence happening in the first place in Australia.[10]

Sustainability of the sector

1.15 The committee received evidence that, although the sector has been growing, this has been matched by an increase in community expectations about its operation standards. In particular, organisations are now expected to discuss their work in terms of effectiveness, or outcomes, rather than describing what they do, or their outputs. The Department of Prime Minister and Cabinet expanded on this at the hearing:

> I think if we look at the sector very broadly we see that over the last couple of decades there has been very significant growth in the size and scale of many not-for-profits. We have seen very significant increases in community expectations. So really, once upon a time, good intentions, if you like, were good enough. I think that is not the case anymore, that the public is saying much more broadly, 'Show me the results. Demonstrate to me the good that you do,' as they are asking that of a number of other actors in society. I think we have seen a real growing of sophistication of the business model, if you like to use that term, of not-for-profits ...
>
> I think there is significantly increased demand for showing not just what your outputs are but what your outcomes are and then what your return, if you like, on investment is ... I think a lot of not-for-profits are grappling with that. That is one of the issues that is a broader context for the sorts of reforms we are talking about.[11]

1.16 The committee acknowledges that encouraging an outcomes culture in charities and not-for-profits is a broad, long term process that needs to

10 Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 9.

11 Mr Paul Ronalds, DPMC, *Committee Hansard,* Canberra, 26 July 2012, pp. 6-7.

occur across many aspects of government. The Bills are part of creating a general environment that is conducive to this approach through reduced red tape, more graduated enforcement powers, and being able to disperse more meaningful information about the sector.

Independent from the ATO

1.17 During the hearing, the committee heard that retaining the regulatory function within the ATO would not have the support of the sector because of a perceived conflict of interest in that the ATO would be acting as both a revenue raiser and regulator.[12] Another criticism of how the ATO has operated in relation to the sector is that its decisions have been perceived as inconsistent. The Not-for-profit sector Reform Council stated in evidence:

> I often hear it as I go round the country. Since I have been chair, I have attended 30 or 40 different functions across Australia, and people do raise that with me—that they can point to a similar organisation that received charitable status or PBI status where they could not, and they maintain that whether you get the endorsement or not depends on which office of the ATO handles your case. They see that having an independent body determining that in an objective manner will certainly be a great improvement on the current circumstances.[13]

1.18 The Commission's Implementation Taskforce gave a commitment to the committee that it would ensure its decisions were consistent, which included placing its registration team in one location:

> The ACNC will determine the charitable status, the PBI status and the health promotion charity status, according, at this stage, to the common law. In due course we may have a statutory definition of charity and then we will determine that in accordance with the statutory definition. We will have our registration team together in one place. We anticipate a high degree of consistency and we will give reasons for both approving and declining to register that status. That will also contribute to consistency, understanding and transparency as to how we make our decisions.[14]

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12 For example, Ms Tanya Fletcher, World Vision Australia, *Committee Hansard,* Canberra, 27 July 2012, p. 2; Mr Paul Ronalds, DPMC, *Committee Hansard,* Canberra, 26 July 2012, p. 9; Ms Linda Lavarch, NSRC, *Committee Hansard,* Canberra, 26 July 2012, p. 20.

13 Ms Linda Lavarch, NSRC, *Committee Hansard,* Canberra, 26 July 2012, p. 20.

14 Mr Murray Baird, ACNCIT, *Committee Hansard,* Canberra, 27 July 2012, p. 33.

1.19 Often, regulatory agencies are created as wholly separate entities within government. The Government considered a number of options in how it would establish a charities regulator, ultimately making a choice between two alternatives.

1.20 The first was to establish an independent statutory office regulator that is not an agency under the *Financial Management and Accountability Act 1997.* This is represented in the Bills. It provides substantial efficiencies to the sector, as well as leveraging off the expertise of the ATO by employing its staff. This was costed at $53.6 million over the forward estimates.

1.21 The other main option was to create a fully independent agency under the *Financial Management and Accountability Act 1997.* Although this would also provide substantial benefits to the sector, it represented more legislative risk, would not access ATO expertise as easily, and would be significantly more expensive. It was costed at $170 million over the forward estimates.

1.22 The Government concluded that the first option, a statutorily independent regulator, accessing the skills and expertise of the ATO, would soon provide substantial benefits for the sector at the least cost.[15]

1.23 The Not-for-profit Sector Reform Council stated in evidence that the key point of the new body is that it should be independent.[16] The Bills deliver this and the committee supports the structure of the Commission on this basis. The legal independence of the Commissioner, and how the Commission will interact with the ATO, is discussed later in this chapter.

Support in the sector

1.24 The general thrust of submissions to the committee was that stakeholders supported the Bills, but they had a range of suggestions for improving Bills.[17] The overall support amongst the sector for the legislation was summarised by the Commission's Implementation Taskforce as follows:

> In the consultations we had around Australia—bearing in mind that people self-select to go to those—there were very few dissenting or angry voices, and those that were there were cynical about red-tape reduction; they believed it would be an increase in the administrative burden. For some, the issue is a sense of a Big

15 Treasury, *Explanatory Materials,* pp. 233-54.

16 Ms Linda Lavarch, NSRC, *Committee Hansard,* Canberra, 26 July 2012, p. 20.

17 For example, Philanthropy Australia, *Submission 20;* The Salvation Army Australia, *Submission 22;* Australian Major Performing Arts Group, *Submission 39.*

> Brother. They believe the sector is operating okay, and they do not see a need for this. But it is a very small minority. We had, overwhelmingly, support for the establishment of the ACNC—as I said in my opening statement, it was not unconditional—and there is no doubt they will judge us to be effective by the degree to which we can reduce red tape.[18]

1.25 It is clear to the committee from the breadth of the evidence that the sector supports the Bills and is committed to cooperating with the Government to bring about effective, workable legislation that will benefit the sector and, in turn, the wider community.

Treasury consultations

1.26 Like many complex policy proposals, the Bills have been through an extended consultation process. Key aspects to the consultation were:

- conducting a scoping study on the regulator, which led to 160 submissions and a final report being issued in July 2011;
- receiving 108 submissions to an initial draft of the legislation, which closed in January 2012;
- ACNCIT community consultations in all capital cities and Townsville, which were attended by approximately 1,600 people and concluded in February 2012; and
- targeted consultation on a further draft in May 2012.[19]

1.27 From the committee's perspective, the most important outcome from consultations is that improvements are made to legislation to improve its workability for all parties. Compared with the initial Bills, the legislation has been refined and improved in relation to the objects clause, registration, deregistration, the Register, governance standards, reporting, duty to notify, information gathering and monitoring powers, enforcement powers, the secrecy framework, review and appeals, penalties, coverage of directors and management committees, and coverage of basic religious charities.[20] In other words, the changes have been comprehensive.

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18 Ms Susan Pascoe, ACNCIT, *Committee Hansard,* Canberra, 26 July 2012, p. 13.

19 Treasury, *Submission 32,* p. 18.

20 Treasury, *Submission 32,* pp. 19-23.

1.28 A number of organisations concurred that the consultations were productive, although some individual deadlines were tight.[21] The Community Council of Australia provided its overview of consultations:

> It has been very positive seeing the changes that have happened to the bill through the consultation processes. We have to remember that this entity was first proposed almost 18 months ago ... When the first exposure draft came out, we had quite a lot of concerns. Initially we had trouble getting Treasury to acknowledge those concerns. I think we now have had those concerns acknowledged, and the redrafting of the bill as is currently is addresses many of those concerns.[22]

Overview of the Bills

1.29 The discussion below covers the main points in the Bills. A key concept in the Bills is the term 'entity'. This can refer to an individual, a body politic, a body corporate, a trust, or any other unincorporated association or body of persons.

Constitutional basis

1.30 The Commonwealth does not have an explicit power to legislate for the sector. Therefore, different heads of power are used to support the Bills:

- the taxation power (subsection 51(ii) of the Constitution) supports the registration scheme as a requirement for these entities' eligibility for Commonwealth tax concessions, as well as related processes such as record keeping, reporting and enforcement;
- the communications power (subsection 51(v)) supports publishing the Australian Charities and Not-for-profits Register, as well as related processes;
- the corporations power (subsection 51(xx)) gives the Commonwealth a general power to legislate for corporations, which in this instance means corporations under the *Corporations Act 2001*. The Bills refer to

21 Mr Barry Wallett, ISCA, *Committee Hansard,* Canberra, 26 July 2012, p. 31; Ms Linda Lavarch, NSRC, *Committee Hansard,* Canberra, 26 July 2012, p. 18; Rev. Brian Lucas, ACBC, *Committee Hansard,* Canberra, 27 July 2012, p. 37; Mr John Colvin, AICD, *Committee Hansard,* Canberra, 27 July 2012, p. 19.

22 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, p. 3.

these as 'federally regulated entities', which are subject to a wider range of enforcement provisions by the Commissioner;

- the territories power (section 122) gives the Commonwealth a general power to legislate for entities incorporated in a territory. These are also regarded as federally regulated entities;
- the external affairs power (subsection 51(xxxix)) supports the establishment of external conduct standards and related processes for all entities.[23]

Registration

1.31 Registration by the Commissioner will entitle entities to access Commonwealth tax concessions. Initially, only charities will be registered.

1.32 Entities that are already recognised as charities by the ATO and are income tax exempt will be taken to be registered with the Commissioner at the commencement of the Bills on 1 October 2012. This streamlined transitional provision means that they do not need to take any other action to be registered. The same applies to two subtype charities: health promotion charities and public benevolent institutions.

1.33 Religious institutions that may be self-assessing as income tax-exempt under item 1.2 in section 50-5 of the *Income Tax Assessment Act 1997,* which do not fit into the above categories, will continue on this basis after 1 October 2012. However, they must notify the Commissioner of their type and subtype within 12 months.

1.34 Broadly, an entity is entitled to register if it:

- meets the description of the relevant type or subtype;
- is a not-for-profit entity;
- meets the governance standards and external conduct standards;
- has a current ABN; and
- is not characterised as engaging in, or supporting, terrorist or other criminal activities under an Australian law.

1.35 The Bill will not change the current definitions of a charity or the various subtypes. The Government is conducting separate consultations on this matter. Entities can register as multiple subtypes, provided they meet the

23 Treasury, *Explanatory Materials,* pp. 19-24.

relevant definitions. If the Commissioner rejects an application for registration, the entity will be able to seek a review of this decision.

1.36 The Commissioner will be able to revoke registration if one of the following apply:

- the registered entity is not entitled to be registered as that type of entity (or as the subtype of entity);
- in its application, the registered entity provided false or misleading information on a material matter;
- the registered entity has contravened, or is likely to contravene a provision of this law, or has not complied, or is likely to not comply with a governance standard or an external conduct standard (a mere suspicion or the possibility of contravention is insufficient for this item);
- the registered entity has a liquidator or similar arrangement because it is unable to pay all its debts when they become due and payable; or
- the entity requested that its registration as a type or subtype of entity be revoked.

1.37 In deciding whether to revoke registration, the Commissioner must consider:

- the nature, significance and persistence of any contravention or non-compliance;
- what action the Commissioner, the registered entity, or any of the responsible entities could have or have taken:
  - ⇒ to address any contravention or non-compliance (or prevent any likely contravention or non-compliance); or
  - ⇒ to prevent any similar contravention or non-compliance;
- the desirability of ensuring that contributions made to the registered entity are applied consistently with the NFP nature and the purpose of the registered entity;
- the objects of any Commonwealth laws that refer to registration under this Bill;
- the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to or jeopardise the public trust and confidence in the NFP sector; and
- any other matter that the Commissioner considers relevant.

1.38 It is expected that revocation of registration will only occur when other avenues have been exhausted. For example, the Commissioner will have the power to issue a notice to an entity for it to show cause why its registration should not be revoked. The notice must state the grounds on which notice is given and the entity will have 28 days in which to respond. However, in very serious cases, the Commissioner is not required to issue this notice and can revoke registration immediately.[24]

The Australian Charities and Not-for-profits Register

1.39 The Commissioner will be required to maintain the Register and publish it on the Internet. The information on the Register is to be consistent with that published by charities regulators overseas and includes:

- identifying and contact details of the entity;
- registration status;
- the entity's governing rules and its responsible entities (directors etc.);
- information statements and financial reports;
- details of any enforcement action taken by the Commissioner and the outcome; and
- any other information as prescribed in the regulations, provided that the Commissioner is authorised to collect it.

1.40 The Commissioner is able to withhold or remove information from the Register, if the information:

- is commercially sensitive and has potential to cause damage to the entity or an individual;
- is inaccurate or likely to cause confusion or mislead the public;
- is offensive;
- could endanger public safety; or
- is specified in the regulations.

1.41 Generally, the Commissioner can nonetheless publish or remove information from the Register if the public interest outweighs these specific legislative provisions.[25]

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24 Treasury, *Explanatory Materials,* pp. 25-41, 203-06.

25 Treasury, *Explanatory Materials,* pp. 43-47.

Governance standards and external conduct standards

Overview

1.42 The Bills allows for the inclusion of governance standards and external conduct standards in the regulations. These can include an entity's governing rules, its conduct and its processes. In addition, all registered entities will be subject to external conduct standards (that is, relating to their conduct outside Australia). The standards are expected to be principles-based and to focus on outcomes, rather than detailing how they are to be met.

1.43 Compliance with the standards is a condition of registration.

Terrorism and other criminal activities

1.44 The Explanatory Memorandum to the Bills states that Australian not-for-profit entities have, in the past, provided support for terrorism and other criminal activities. This has occurred both unwittingly and deliberately.

1.45 The Financial Action Task Force is an international, inter-governmental body established in 1989 to promote how to combat money laundering, terrorist financing and other threats to the international financial system. Australia is a member of the Task Force and has agreed to comply with its recommendations. Special recommendation VIII states:

> VIII. Non-profit organisations
>
> Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:
>
> - by terrorist organisations posing as legitimate entities;
> - to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
> - to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

1.46 In its last review in 2005, the Task Force found that Australia was only partially compliant with this special recommendation.[26]

26 Treasury, *Explanatory Materials,* pp. 49-57.

Reporting and record keeping

Record keeping

1.47 A registered entity is required to keep records of its transactions, financial position and performance. The records must be sufficient to enable:

- the preparation and audit of financial statements;
- an assessment of its entitlement to be registered as a type or sub-type (this assessment is undertaken by the Commissioner);
- an assessment of its compliance with the Bill and regulations (undertaken by the Commissioner); and
- an assessment of compliance with any taxation law (undertaken by the Commissioner of Taxation).

1.48 Failure to maintain adequate records is an offence of strict liability of 20 penalty units ($2,200). This is low when compared with similar tax offences for businesses.

Proportionality

1.49 Reporting requirements are proportional to the size of the entity. The thresholds between small and medium, and medium and large entities are set at revenues of $250,000 and $1 million respectively. Revenues are calculated in accordance with the accounting standards. The Commissioner also has the discretion to set an entity's size for a financial year to flexibly manage one-off events for an entity, such as a large one-off bequest.

Information statements

1.50 All registered entities will be required to lodge an information statement with the Commissioner within six months of its reporting year. This will be the financial year, unless entities use a substituted accounting period. Administrative penalties may apply for late lodgement, although the Commissioner will be able to provide extensions if circumstances require.

1.51 The Commissioner will set the content of the information statements, which will probably include matters such as governance, finance, purposes, objects and beneficiaries. The statements may have different, proportional requirements for small, medium and large entities.

Financial reporting

1.52 Medium and large registered entities must submit annual financial reports to the Commissioner within six months of the end of their financial year. The content of the reports will be set out in regulations and are expected to have some basis in the accounting standards. Basic religious charities do not need to submit financial reports, but if they do, they must comply with all requirements.

1.53 The Commissioner may approve a substituted accounting period (i.e. a financial year not ending on 30 June) for an entity. If an entity currently uses a substituted accounting period under Australian law, and it advises the Commissioner of this within six months of the commencement date, it will be taken to have the Commissioner's approval to do so.

1.54 If a registered entity identifies a material error in its financial report, it must supply the Commissioner with a corrected report within 28 days.

Miscellaneous

1.55 The Commissioner will have the power to require a registered entity, or class thereof, to provide additional information in reports, or provide additional reports, through a written determination. This is expected to only be used where a registered entity is suspected of breaching the Bill.

1.56 The Bill includes provisions to facilitate collective and joint reporting by related entities to reduce their compliance costs.

Audits and reviews

1.57 Large entities must have their financial report audited and obtain an auditor's report. Medium entities can have their financial report reviewed instead. However, the Commissioner can require a medium entity to be subject to audit. This is expected to occur where this entity has a history of non-compliance.

1.58 Reviews provide a lower level of assurance than an audit. The latter is conducted according to audit standards by a registered company auditor, an audit firm or authorised audit company. A review is conducted to lesser standards and can be conducted by a member of the Institute of Chartered Accountants in Australia or CPA Australia.[27]

27 Treasury, *Explanatory Materials,* pp. 59-72, 207-09.

Duty to notify

1.59 The Bills will require registered entities to notify the Commissioner if any of the following have occurred:

- its name or address have changed;
- its governing rules have changed;
- its responsible entities (e.g. directors) have changed;
- it has significantly contravened a provision of the Act and it therefore is no longer entitled to be registered as a particular type or subtype; and
- it has significantly contravened a governance or external conduct standard and it therefore is no longer entitled to be registered as a particular type or subtype.

1.60 In determining the significance of contravention or non-compliance, it is important to consider:

- the nature, significance and persistence of the conduct; and
- the desirability of ensuring that contributions to the entity are applied for its not-for-profit nature and the entity's stated purpose.

1.61 Medium and large entities must give the Commissioner notice of these matters as soon as possible, but no later than 28 days. The same generally applies to small entities, except that their maximum period is 60 days. Where the matter involves a significant breach of the Act by a small entity, the maximum notification period is 28 days.

1.62 Penalties apply for not notifying the Commissioner of matters required under law. These are adjusted for the extent to which an entity seeks to cooperate with the Commissioner and are discussed below.[28]

Information gathering and monitoring powers

Information gathering

1.63 In addition to receiving information statements and financial reports, the Commissioner will have other ways of obtaining information about entities. These extra powers are appropriate because the Commissioner will provide a centralised service to Commonwealth agencies about

28 Treasury, *Explanatory Materials,* pp. 73-78.

entities' charitable status and whether they meet certain standards of governance.

1.64 The Commissioner will have the power to gather information and documents that are reasonably necessary to determine whether:

- a registered entity has complied with a provision subject to monitoring in the Bills; or
- information given by a registered entity is correct and accurate.

1.65 The Commissioner can send information requests to any entity. They do not need to be registered. The Commissioner can send a written notice to an entity requesting that it:

- give to the Commissioner any information, within the period and in the manner and form specified in the notice;
- attend and give evidence before the Commissioner for the purpose of obtaining information;
- produce any documents to the Commissioner, within the period and in the manner specified in the notice; or
- make copies of any documents and to produce them to the Commissioner, within the period and in the manner specified in the notice.

1.66 An entity that does not comply with one of these requests commits an offence. The penalty is 20 penalty units ($2,200), which is low when compared with similar tax offences for businesses. The minimum period that the Commissioner can set for compliance is 14 days.

1.67 These powers are appropriate because organisations in the sector are subject to less oversight than other organisations in our society, such as a business. For example, the latter is overseen by investors and ASIC oversees business corporations. Charities and not-for-profits obtain revenue and resources from donors and volunteers and often provide services for the most vulnerable members of the community. The Commissioner's oversight of the sector will help ensure that the benefits it provides to the community will be maximised.

1.68 The Bills also recognise the privilege against self incrimination. In addition to the importance of fundamental principles of justice, overriding this privilege carries the risk that entities and individuals will be less likely to provide information that the Commissioner requires. Therefore, evidence gained through these processes will only be admissible in court if they relate to:

- failure to comply with the Commissioner's written notice;
- contraventions of section 137.1 or 137.2 of the *Criminal Code,* which relate to false or misleading information; and
- contraventions of section 149.1 of the *Criminal Code,* which relate to obstruction of Commonwealth public officials.

Monitoring powers

1.69 Officers of the Commission will be able to enter the premises of an entity and exercise monitoring powers in relation to compliance with a provision subject to monitoring. Officers will only be able to do this if the occupier of the premises has consented, or entry is made under a monitoring warrant. Warrants are to be issued by magistrates. Officers will not be limited to accessing premises of registered entities, but the information sought must be necessary to administering the legislation.

1.70 Provisions subject to monitoring include:

- a provision of a legislative instrument made under this Bill or a provision of the Bill or that creates an offence;
- a provision of the *Crimes Act 1914* or the *Criminal Code* that creates an offence, to the extent that the offence relates to the Bill or a legislative instrument made under the Bill;
- a provision of the Bill or a legislative instrument made under the Bill, if non-compliance with the provision gives rise to an administrative penalty; and
- ongoing eligibility for registration including conditions for registration in clause 25-5 and for the revocation of registration in clause 35-10.

1.71 Information subject to monitoring includes information given to the Commissioner:

- in compliance or purported compliance with a provision of the Bill or of a legislative instrument made under the Bill;
- in compliance or purported compliance with a provision of the *Crimes Act 1914* or of the *Criminal Code,* to the extent that the provision relates to the Bill or a legislative instrument made under the Bill; or
- any other information given to the Commissioner, including information given voluntarily, which is included on the Australian Charities and Not-for-profits Register.

1.72 Officials of the Commission have a range of monitoring powers that they can use when they can enter premises. It must be remembered that these powers will often be exercised on the behalf of other Commonwealth agencies because they will ultimately use it in administering their own functions.

1.73 The monitoring powers given to Commission officials are:

- the power to search the premises and anything on the premises;
- the power to examine or observe any activity conducted on the premises;
- the power to inspect, examine, take measurements of, or conduct tests on, anything on the premises;
- the power to make any still or moving image or any recording of the premises or anything on the premises;
- the power to inspect any document on the premises;
- the power to take extracts from, or make copies of, any such document;
- the power to take onto the premises such equipment and materials as the ACNC officer requires for the purpose of exercising powers in relation to the premises;
- the power to sample anything on the premises; and
- the powers set out in the Bill including the power to operate electronic equipment on the premises and the authority to have other individuals assist Commission officers.

1.74 Information gained from these powers will not be used against individuals in criminal proceedings, except where it relates to offences listed above in relation to the exceptions against the privilege against self incrimination.[29]

Education, compliance and enforcement

Overview

1.75 The Bills will give the Commissioner the enforcement powers to:

- issue warning notices;
- issue directions;

29 Treasury, *Explanatory Materials,* pp. 79-96.

- enter into enforceable undertakings;
- apply to the courts for injunctions;
- suspend or remove responsible entities (e.g. directors); and
- appoint acting responsible entities.

1.76 Generally, these powers will only be exercisable over federally regulated entities (those regulated under the corporations and territories powers). The exception is for external conduct standards, when the Commissioner's enforcement powers will be exercisable over all registered entities.

1.77 These enforcement powers are similar with those in overseas jurisdictions, such as the Charities Commission of England and Wales and the Office of the Scottish Charity Regulator. They also offer much more flexibility than that available to the ATO, the current default regulator, which can only revoke an entity's access to a tax concession. ASIC, which regulates some charities, has a wider range of enforcement powers such as being able to issue directions, entering into enforceable undertakings, and applying for injunctions.

Application and necessity clauses

1.78 These constrain the actions of the Commissioner to ensure that their enforcement powers are only used appropriately. They generally apply to the Commissioner's enforcement powers.

1.79 The application clause provides that the Commissioner is only able to use enforcement powers if:

- an entity is a federally regulated entity, and the Commissioner reasonably believes that the entity has contravened, or is likely to contravene, a provision in the Bill;
- an entity is a federally regulated entity, and the Commissioner reasonably believes that the entity has not complied, or is likely to not comply, with a governance standard; or
- the Commissioner reasonably believes that the registered entity has not complied, or is likely to not comply, with an external conduct standard.

1.80 The necessity clause provides that the Commissioner can only use enforcement powers when it is necessary to directly address the contravention or likely contravention of the Bills, or the non-compliance or likely non-compliance with a governance standard or external conduct standard.

Applying the Commissioner's discretion

1.81 Before using an enforcement power, the Commissioner must take the following into account:

- the nature, significance and persistence of the contravention or non-compliance;
- the actions the Commissioner, the registered entity, or any of the responsible entities could have taken to address the contravention or non-compliance (or prevent the likely contravention or non-compliance);
- the actions the Commissioner, the registered entity, or any of the responsible entities could have taken to prevent any similar contravention or non-compliance in the future;
- the desirability of ensuring that contributions made to the registered entity are applied consistently with the not-for-profit nature, and the purpose, of the registered entity;
- the objects of any Commonwealth laws that refer to registration under this Bill;
- the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the sector; and
- any other matter of policy that the Commissioner considers relevant.

Matters specific to individual enforcement powers

1.82 The Commissioner must make warning notices, enforceable undertakings, and the suspension or removal of responsible entities publicly available on the Register.

1.83 The Commissioner may direct a registered entity not to enter into a specified commercial transaction, financial transaction or other transaction. They are required to comply, regardless of any provision in their governing rules or any contract it has entered into.

1.84 The application and necessity clauses do not apply to enforceable undertakings because they are agreements that are voluntarily entered into by the Commissioner and a registered entity.

1.85 A responsible entity (e.g. director) that is suspended or removed may not communicate instructions or wishes with the registered entity. Doing so attracts a strict liability offence of 50 penalty units ($5,500). The

Commissioner may appoint an interim responsible entity and direct them to do specific acts in relation to the entity. It is expected that the Commissioner will only suspend or remove responsible entities for serious contraventions or non-compliance.[30]

The Commission and the Advisory Board

The Commission

1.86 The Commission will comprise the Commissioner and all staff assisting the Commissioner that are employed under the *Public Service Act 1999* and are subject to the Commissioner's directions. The staff will be provided by the ATO, but they will be responsible to the Commissioner and take directions from them. Staff will be required to comply with the directions of the Commissioner if there is a conflict with directions from the ATO.

1.87 The Commissioner will be an independent statutory office and will not be subject to direction of a Minister or agency. Their term of appointment will be five years and they will be eligible for re-appointment. The usual conditions for termination of appointment apply for independent statutory officers, such as bankruptcy, misbehaviour, incapacity, or being absent without leave.

1.88 The Commissioner must disclose to the Minister all their interests that may conflict with the proper performance of their duties. They will not be able to engage in paid employment without the Minister's approval.

1.89 The Bills establish a Special Account, through which the Commission will be funded. It will sit with the portfolio budget statements of the ATO and will be accounted for as its own item. A memorandum of understanding will be signed between the Commissioner and the Commissioner of Taxation to set out how the two agencies will work together, including how the Commissioner will independently manage the Commission's budget.

1.90 The Commissioner must provide an annual report to the Minister as soon as possible after the end of each financial year.

The Advisory Board

1.91 The Bills establish an Advisory Board comprising two to eight members. Collectively, they must have expertise in relation to the sector, or

30 Treasury, *Explanatory Materials,* pp. 97-133.

experience and qualifications in law, tax or accounting. They must also disclose any possible conflicts of interest to the Minister. Members can be appointed for a period of up to three years.

1.92 The Board's function is to provide advice, in response to a request from the Commissioner, in relation to the Commissioner's legal functions. It must meet at least four times a year. The Board will have no decision-making powers and it is not expected to spend public monies.[31]

Secrecy framework

Overview

1.93 Generally, information obtained by the Commissioner is to be protected and kept confidential, unless the Commissioner is legally entitled to disclose it under the Bills. This includes providing information to other agencies under the Commissioner's role of being a 'one-stop-shop' regulator and the publication of information statements, financial reports and other documents on the Register. Disclosure by a Commission officer attracts a criminal offence, with a maximum penalty of two years imprisonment and a fine of 120 penalty units ($13,200).

1.94 Some current secrecy provisions will continue to apply to information collected by the Commissioner, including those under the *Tax Administration Act 1953* and the privacy principles. Conversely, some Commonwealth legislation will override the Bills in allowing some agencies to access information. These provisions include:

- sections 32 and 33 of the *Auditor-General Act 1997;*
- section 9 of the *Ombudsman Act 1976;*
- section 44 of the Privacy Act;
- section 12 of the *Parliamentary Privileges Act 1987;* and
- Schedule 6 to the *Anti-Terrorism Act (No. 2) 2005.*

1.95 Information that must be protected is that disclosed to or obtained by a Commission officer for the purposes of the Bills. Information that does not identify an entity or is already public is not included in the prohibition. For these provisions, a Commission officer includes:

- an entity engaged to provide services relating to the Commission;

31 Treasury, *Explanatory Materials,* pp. 135-45.

- an individual employed by an entity referred to above;
- an individual appointed or employed by, or performing services for, the Commonwealth or an authority of the Commonwealth that is performing functions or exercising powers under, or for the purposes of, the Bill; or
- a member of the Advisory Board.

Exceptions

1.96 The exceptions to the general prohibition against disclosure include:

- to the entity to whom the information relates;
- to an Australian government agency;
- disclosure or use in the performance of duties under the Bill;
- disclosure on the Australian Charities and Not-for-profits Commission Register (ACN Register) to achieve the objects of the Bill;
- disclosure or use with consent of the entity; and
- disclosure of information lawfully made available to the public.

1.97 A Commission office cannot be compelled to disclose protected information to a court or tribunal except where it is necessary for the purposes of the Bills.

On-disclosure by Commonwealth agencies

1.98 Where an agency receives information from the Commission under the Bills, typically for that agency's functions, there will be a general prohibition on the agency further disclosing the information. On-disclosing this information attracts a criminal offence, with a maximum penalty of two years imprisonment and a fine of 120 penalty units ($13,200).

1.99 The exceptions include:

- on-disclosure to the entity to whom the information relates;
- on-disclosure or use of information for the original purpose or in connection with the original purpose that it was disclosed; and

- on-disclosure of information that has lawfully been made available to the public.[32]

Transitional provisions

1.100 In order to ensure a smooth transition for the Commission, ATO officers can disclose tax information about an entity to the Commissioner, provided it relates to the functions under the Bills. This will only apply for six months after the commencement date. Therefore, the Commission will be fully functional from the commencement date and does not need to contact entities individually for information which the ATO already has.[33]

Reviews and appeals

Overview

1.101 The review and appeal process in the Bills is closely modelled on that in Part IVC of the *Taxation Administration Act 1953*. Two advantages of this approach are that the process will be familiar to stakeholders and it will also allow appeals against decisions of the Commissioner and the Commissioner of Taxation to be heard together.

1.102 Only an entity directly affected by a decision can request a review or make an appeal and only in respect of 'administrative decisions'. These are defined in the Bill as:

- a refusal of an application for registration or registration itself;
- a revocation of registration;
- a decision to give a direction;
- a decision to vary a direction;
- a decision not to vary or revoke a decisions after 12 months;
- a decision to suspend the responsible entity;
- a decision to change when a suspension of the responsible entity ends;
- a decision to remove a responsible entity; and
- a decision to remit all or a part of an administrative penalty.

1.103 Entities will have four avenues of review and appeal:

32 Treasury, *Explanatory Materials,* pp. 147-61.

33 Treasury, *Explanatory Materials,* pp. 211-13.

- making an objection to the Commissioner of an administrative decision;
- requesting the AAT to review an objection decision or an extension-of-time-refusal decision;
- asking the courts to review an objection decision; or
- making a combined application for AAT review or appeal to the court.

Objecting to an administrative decision

1.104 An entity must lodge its objection to the decision within 60 days of it being served on the entity. This is consistent with the time provided under tax provisions, for example section 14ZW of the *Taxation Administration Act 1953*. The Commissioner has the discretion to accept late lodgements, depending on the circumstances of the case.

1.105 The Commissioner must respond within 60 days and can ask for additional information, whereupon the time period is reset to 60 days. If the Commissioner does not respond within the time period, they are taken to have disallowed the objection.

1.106 The Commissioner must inform the entity of their decision in writing, which must also inform the entity that they may request reasons for the decision. Reasons must be provided within 28 days.

AAT review of an objection decision or extension of time refusal decision

1.107 The entity seeking review has the burden of proof in demonstrating that the Commissioner's decision was made in error. This is consistent with Part IVC of the *Taxation Administration Act 1953*. Entities are also required to comply with the Commissioner's decision until the AAT review is finalised. This prevents Commonwealth agencies incurring unnecessary costs. Once appeal rights from the AAT's decision expire, it becomes final and the Commissioner has 60 days to implement it.

1.108 The *Administrative Appeals Tribunal Act 1975* generally operates in relation to these matters. The main exceptions are AAT procedures that are amended for this legislation to be consistent with provisions in the Bills. For example, section 27 of the Act states that having an 'interest' is sufficient to appeal a decision, whereas the Bills have the higher standard of an appellant requiring a 'direct interest'. Another example is precluding the operation of section 41, which allows the AAT to stay or vary the decision. As discussed above, the Bills seek to remove this possibility for certain decisions in the interests of more efficient administration.

Reviewing an objection decision by the courts

1.109 In order to obtain a review of an objection decision, the entity must lodge the appeal with the court within 60 days of receiving written notice of the decision from the Commissioner. The entity will have the burden of proof in demonstrating that the Commissioner's decision was incorrect.

1.110 As above, the lodgement of an appeal does not affect the validity of the Commissioner's decision. The Commissioner only needs to rectify their decision once a court order changing their decision is final. This occurs where there are no avenues of appeal remaining, or the appeal period has expired. The Commissioner then has 60 days to rectify their decision.[34]

Penalties and offences

Administrative penalties

1.111 The Bills establish a regime for administrative penalties. These can be imposed by Commonwealth agencies without the need for court action. It is not expected that they will be imposed frequently. However, appropriate sanctions are required for a deterrent effect and to protect those who seek to cooperate with the Commissioner. The regime is proportional and takes into account the conduct of the entity involved.

1.112 The main categories of administrative penalties are for false or misleading statements or failure to lodge documents on time. For the former, the penalty amount is:

- 20 penalty units ($2,200) where the false or misleading statement was due to a failure to take reasonable care to comply with the Act;
- 40 penalty units ($4,400) for recklessness; and
- 60 penalty units ($6,600) for intentional disregard.

1.113 The penalty can be increased or decreased by 20 per cent where the entity sought to obstruct the Commissioner or voluntarily disclose the error to the Commissioner, respectively.

1.114 For failure to lodge documents on time, the base penalty amount is 1 penalty unit ($110) for each 28 day period that the document is late, up to a maximum of 5 penalty units. This base amount applies to small entities. It is doubled for medium entities and multiplied by five for large entities.

34 Treasury, *Explanatory Materials,* pp. 163-75.

1.115 Administrative penalties will be payable within 14 days of the Commissioner issuing the penalty notice. The Commissioner may remit part of or the entire penalty. If they do not remit the entire penalty, they must provide reasons to the entity. The general interest charge (GIC) will apply to unpaid penalty amounts and will be collectable by the ATO. This will centralise Government debts and improve cost effectiveness.

Offences

1.116 The Bills impose obligations, liabilities or offences on individuals, referred to as 'covered entities', which are responsible for managing the organisation (or entity) in question. This is particularly important in the case of unincorporated associations, because the organisation has no legal status. The relevant covered entities are:

- each member of the committee of management (or 'directors') of an unincorporated association;
- the trustee of a non-corporate trust; and
- the directors of a corporate trustee or of a registered body corporate.

1.117 Obligations are imposed on the covered entities at the same time as an obligation is imposed on the relevant entity. Liabilities that are payable under the Bills by these trusts and unincorporated associations are payable by each covered entity at the time the amount becomes payable. Covered entities are only liable if the liability arose because of their misconduct, with the precise requirements varying across the type of entity.

1.118 Defences also apply, for which the defendant will bear the burden of proof. Covered entities will have a defence where, due to ill health or other reason, they either did not take part in the management of the entity, or it would have been unreasonable to expect them to do so. The second defence is where the covered entity took all reasonable steps to ensure that the offence did not occur, or there were no such steps available.[35]

35 Treasury, *Explanatory Materials,* pp. 187-201.

Objectives and conduct of the inquiry

1.119 The objective of the inquiry was to investigate the adequacy of the Bills in achieving their policy objectives and, where possible, identify any unintended consequences.

1.120 Details of the inquiry were placed on the committee's website. On Friday, 6 July 2012, the Chair issued a media release announcing the inquiry and seeking submissions.

1.121 The committee received 79 submissions and supplementary submissions, and four exhibits. They are listed in Appendix A. The submissions are available on the committee's website at www.aph.gov.au/economics.htm.

1.122 The committee held public hearings in Canberra on Thursday and Friday, 26 and 27 July 2012. The witnesses who appeared at the hearing are listed in Appendix B. The hearing transcripts are also available on the committee's website.

2

Analysis of the Bills

2.1 The overwhelming evidence presented to the inquiry was that the charities and not-for-profits sector supports the establishment of the Commission, although there is potential for improving the legislation. This chapter presents some of the evidence in support of the Commission and the ways in which it will make it easier to work in the sector. Suggested improvements to the Bills then follow.

Support for the Commission and its benefits to the sector

Less red tape, the charities passport and lodge once-use often

2.2 As ACOSS stated during the hearings, organisations claiming tax exempt status from the ATO will transfer this regulatory relationship to the Commission.[1] Looking beyond this change, many organisations in the sector have a regulatory relationship with other Commonwealth agencies. Treasury advised the committee that it is in the process of removing this duplication:

> For some entities the reductions [in red tape] will happen immediately, particularly those entities that are regulated at the Commonwealth level. The consequential amendments that will accompany the ACNC draft will relinquish the responsibilities of ASIC and a number of other Commonwealth regulators in respect of charities where there is duplication. If we use a company limited by guarantee, for example, it will no longer be reporting to ASIC ... Its interaction will be only with the ACNC. Within that,

1 Dr Cassandra Goldie, ACOSS, *Committee Hansard,* Canberra, 26 July 2012, p. 40.

> the regulatory framework applying to it under the ACNC is less onerous than the current Corporations Act equivalent for that entity. So those entities will face an immediate reduction in their red tape and compliance costs.[2]

2.3 Treasury is also working on a 'charities passport' and a lodge once-use often regulatory system. The idea is that organisations in the sector will only have to provide certain information to the Commonwealth once, and the Commission will be the point at which this occurs. The information provisions in the Bill are designed to allow the Commission to pass information on to other agencies for appropriate purposes. More generic information will be placed on the ACN Register, which will allow charities to prove their bona fides without effort.

2.4 The Implementation Taskforce described how the reduction of duplication is progressing within government:

> ... Treasury and the task force are working on an absolutely comprehensive piece of work across the Commonwealth that would see the current reporting requirements of every charity put on the table with the relevant department and charity representatives, along with the requirements that would come through the ACNC's annual information statement, and reconciliation where there is duplication.[3]

2.5 Currently, 33 Acts are under consideration for this purpose.[4] This represents a significant reduction in the compliance burden for organisations with a high exposure to the Commonwealth. Of course, many organisations in the sector are more exposed to State and Territory frameworks. The committee concurs with the Commissioner's observation that addressing overlap with State and Territory requirements would represent a 'radical reduction' in red tape.[5]

2.6 At the hearings, Treasury indicated that it has been negotiating with the States and Territories and that some jurisdictions plan to 'turn off' their associations legislation if they will be covered by the new Bills:

> ... discussions on incorporated associations are continuing with the states and territories. Some states have already indicated that they will be turning off the incorporated association acts to the extent that the ACNC is covering them, just as we are with the

2 Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 4.

3 Ms Susan Pascoe, ACNCIT, *Committee Hansard,* Canberra, 27 July 2012, p. 27.

4 Treasury, *Submission 32.1,* pp. [13-17]

5 Ms Susan Pascoe, ACNCIT, *Committee Hansard,* Canberra, 27 July 2012, p. 26.

> Corporations Act. In other states, those discussions are continuing.[6]

2.7 Given the scale of the task of establishing an accurate database and untangling a web of regulatory requirements, it is only to be expected that red tape reforms will take time to bear fruit. The Community Council of Australia best summarised this:

> If all we can do is establish that the Australian Charities and Not-for-profits Commission has a very accurate and reliable dataset of all the charities in Australia with some basic information about them, and that, when a charity applies for a grant or some kind of concession or is engaged with some level of government or regulation, they can just provide the link to the data that is on the ACNC website as the reference point for their core information—if we can get to that point, that will make a massive difference in the first instance ... I think that is at least a couple of years ... of work before that level of information and that level of reliability are established. But, once it is, the potential for it to benefit the sector is enormous. I do not think people quite realise how often charities have to demonstrate their bona fides, and the capacity to do that, by having the equivalent of a charities passport, has incredible appeal.[7]

Transferring the registration role from the ATO

2.8 The committee received consistent evidence that the sector regards the ATO has a revenue raising agency, and that this is perceived as affecting its decisions on organisation's charitable status, which has tax implications. Further, the ATO's decisions are not always perceived as being consistent.[8]

2.9 This has had led to a less than positive relationship generally between the ATO and the sector. ACOSS summarised the ATO's situation as, '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.'[9]

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6 Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 11.

7 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, pp. 4-5.

8 National Disability Services, *Submission 34,* p. 1; NSRC, *Submission 28,* pp. 3-4; The Smith Family, *Submission 9,* pp. 2, 4.

9 ACOSS, *Submission 56,* p. 2.

2.10 The Community Council of Australia expanded on these issues, noting that many smaller organisations in the sector see the ATO as a very imposing organisation and are not able to deal with it effectively:

> When you talk to these groups about why they have or have not applied, it is because it is an intimidating process. It requires a lawyer, or that is their perception. Engagement with the ATO is not something that Australians see as really desirable. Unless you have a good lawyer and get the right ATO person, it can be a quite involved and engaged process, and it favours larger organisations ... and it favours those organisations who can come and see people like you. There are so many smaller not-for-profits that should be able to claim charitable status that just find the process too difficult.
>
> ... There are examples of people who feel that, when the ATO engages with them, their capacity to actually engage in a real discussion about what is happening for their organisation is non-existent. It is an ATO ruling; that is it; you go to court, you accept it or you do not. As I said, if we tried to impose the ATO as the group that determined charitable status in the sector, I can only imagine that there would be a massive outcry, if there were not already.[10]

An educative regulator

2.11 In evidence, the Interim Commissioner outlined the proposed regulatory approach. In short, it involves taking an educative approach with charities, and then escalating the response, if warranted by an organisation's conduct:

> You would have noted, in looking at the statutes, that they are graduated and that there is opportunity for self-correction. What we have provided in the implementation report is a regulatory pyramid that details the approach that would be taken, which would begin with a very strong emphasis on education, guidance and advice. So there is a significant function for the ACNC, not just in developing material for the website and to be publicly available—some dedicated to charity, some to the public—but also with a phone advisory service and an email advisory service. If there is sustained noncompliance with the requirements, there are reminders and so on and you can move then to formal warnings.

10 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, p. 10.

> So you can have proactive intervention. If there appears to be wilful and serious noncompliance, particularly if there is concern about the conduct of that entity, then the commissioner does have powers to suspend.[11]

2.12 The committee regards this approach as well-balanced. The educative focus was also favourably received by many stakeholders in the inquiry.[12] The comments of the Consumers Health Forum of Australia were representative of much of the sector:

> CHF recognises the need for the Bill to include wide-ranging enforcement powers for the ACNC Commissioner, to address the unscrupulous activities of a small minority of NFP organisations. We welcome, however, the emphasis on the ACNC's educational activities in all the sections of the legislation dealing with compliance, as this clearly indicates that the intention of the ACNC is to work with registered entities and provide them with guidance to assist them to comply with and understand their obligations under the legislation.[13]

2.13 The committee believes that an educative, proportional approach will greatly assist the sector in achieving compliance efficiently and effectively and is encouraged by the depth of forethought that the Implementation Taskforce has displayed on this issue.

The Commission is off to a good start

2.14 The committee received evidence that the Implementation Taskforce, headed by Interim Commissioner Susan Pascoe, has been effective in establishing the Commission and communicating to the sector how it can be expected to operate.[14]

2.15 The Taskforce has been holding consultations and has published an *Implementation Report,* which comprehensively outlines the Commission's regulatory approach, with an emphasis on proportionality, transparency, fairness, timeliness, and consistency.[15] The Smith Family appreciated the *Implementation Report* in that it communicated to the sector that the Commission will apply a measure of trust where warranted. The Smith

11 Ms Susan Pascoe, ACNCIT, *Committee Hansard,* Canberra, 26 July 2012, p. 8.

12 For example, The Smith Family, *Submission 9,* p. 4; NSRC, *Submission 28,* p. 4; World Vision Australia, *Submission 61,* p. 1.

13 CHF, *Submission 14,* p. 2.

14 For example, World Vision Australia, *Submission 61,* p. 11.

15 ACNC Implementation Taskforce, *Implementation Report,* June 2012, p. 7.

Family stated, 'It is pleasing that the directions spelt out in the Implementation Taskforce Report suggest that a trust-based approach is reasonably well founded.'[16]

2.16 Catholic Health Australia summarised the sector's positive perceptions of the Interim Commissioner's performance to date:

> I also congratulate Commissioner Pascoe and thank the government for their good sense in appointing such a capable initial commissioner. Indeed—without seeking to embarrass her noting her presence in the room today—her appointment gives much confidence to people within the not-for-profit sector that the commission is off to a good start.[17]

'Red tape' in the objects of the Bills

Background

2.17 Reducing the burden of 'red tape' facing the not-for-profit sector is one of the explicit aims of the Bills and one of the most sought-after aspects of reform in the charities sector. The Government has recognised the important role played by the sector in establishing an inclusive and productive Australia and has committed to deliver smarter regulation, reduce red tape, and improved transparency and accountability of the sector.[18]

Analysis

2.18 The committee acknowledges that the Government's establishment of the Commission is part of its strategy to reduce red tape and notes that there is already a reference to the reduction of red tape in the objects of the main Bill.

2.19 The Treasury submission outlines how the new national regulatory system of the not-for-profit sector will deliver significant benefits to the sector, including 'reducing red tape and duplication by streamlining process'. [19] Moreover, Treasury notes that the 'establishment of a national regulatory

16 The Smith Family, *Submission 9,* p. 3.

17 Mr Martin Laverty, CHA, *Committee Hansard,* Canberra, 26 July 2012, p. 21.

18 Treasury, *Explanatory Materials*, p. 232.

19 Treasury, *Submission 32,* p. 9.

framework, and a "one-stop shop" regulator, would in itself, reduce regulatory burden on the sector':

> ... the objects clause currently requires the Commissioner to have regard to the 'benefits gained from minimising procedural requirements and procedural duplication by cooperation between the Commissioner and other Australian government agencies; and effective administration of the laws that confer functions and powers on the Commissioner.'
>
> In addition, a reference to red-tape reduction has been made in the Guide to the draft Bill, which provides that the ACNC Commissioner will 'cooperate with other government agencies to oversee a simplified and streamlined regulatory framework for not-for-profit entities.'[20]

2.20 Nevertheless, submissions were consistent in requiring stronger and specific statement on reduction of red tape in the objects. The Uniting Church in Australia told the Committee:

> We believe that red tape reduction should be the cornerstone of the bill and that it should empower the commission to take action to reduce the unnecessary duplicative and burdensome administrative reporting and compliance obligations on the sector. This would be in keeping with the government's own stated aim that red tape reduction is the foundation stone of its not-for-profit reform agenda. It is important to note that we are asking for a reduction in unnecessary red tape and not a reduction in accountability or transparency. Therefore, we ask the committee to recommend amending the objects of the bill to include a clear obligation on the government and its agencies to reduce the unnecessary duplicative and burdensome administrative reporting and compliance obligations on not-for-profits.[21]

2.21 The Not-for-profit Sector Reform Council expressed concern that the 'preamble and the objects do not reflect one of the original intentions of the Commission, which was to reduce red tape for the not-for-profit sector.' The Council stated:

> The focus of the current draft does not provide any detail on how the reporting burden for registered organisations would be reduced. As an example, the bill could include the fact that organisations registered with the ACNC and in receipt of a

20 Treasury, *Submission no. 32.1,* p. 2.

21 Mr James Mein, Uniting Church in Australia, *Committee Hansard*, Canberra, 27 July 2012, p. 40.

> Commonwealth grant would not be required to submit financial acquittals for the Commonwealth grant if, as an organisation, they submitted audited financial statements to the ACNC.[22]

2.22 Likewise, ACOSS was concerned that 'provisions such as those at 15-10 that refer to benefits from minimising procedural requirements and duplication, or cooperation between the Commission and other government agencies, do not provide adequate assurance that the sector will benefit from this reform'. The submission stated:

> 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.[23]

Conclusion

2.23 The Committee acknowledges the wishes of the not-for-profit sector that the reduction of 'red tape' should be made an explicit object of the Bill and agrees this should occur.

Recommendation 1

2.24 **That the objects of the Australian Charities and Not-for-profits Commission Bill 2012 explicitly include the reduction of red tape.**

22 Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 1.

23 ACOSS, *Submission 56,* p. 3.

'Public trust and confidence'

Background

2.25 One of the objects of the Bill is to 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'.[24] Amongst other things, in performing his or her functions and exercising his or her powers, the Commissioner must 'have regard to the maintenance, protection and enhancement of public trust and confidence in the not-for-profit sector'.[25] Moreover, in deciding whether to revoke the registration of an entity the Commissioner must take account of a range of matters, including 'the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector mentioned in subclause 15-5(1) (Objects of this Act)'.[26]

2.26 The way in which the legislation and explanatory materials portray the level of public trust and confidence in the sector was of great importance to stakeholders. For example, ACOSS stated, '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.'[27]

Analysis

2.27 Evidence presented to the Committee raised concerns about the application of 'public trust and confidence' in determining the revocation of registration under the provisions of the Bill. In its submission, Catholic Social Services Australia highlighted the legal ambiguity of the terminology:

> Under section 35-10(2)(e) of the Exposure Draft, the Commissioner can revoke the registration of a charity if that charity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the NFP sector. Given the inherent subjectivity on this matter, we recommend enhanced clarity about the definition to be used for decisions by the Commissioner which may be based on this terminology.[28]

24 Australian Charities and Not-for-profits Commission Bill 2012, s. 15-5.

25 Australian Charities and Not-for-profits Commission Bill 2012, s. 15-10.

26 Australian Charities and Not-for-profits Commission Bill 2012, s. 35-10(2)(e).

27 ACOSS, *Submission 56,* p. 3.

28 Catholic Social Services Australia, *Submission 17,* p. 9.

2.28 Catholic Health Australia made a similar point:

> At present the bill gives no definition of what that new legal principle might mean. I come to this inquiry not knowing what the application of the principle might mean for the governance of our organisations. What I can point to at the moment is section 180 of the Corporations Act that tells directors of not-for-profit organisations that they have to exercise their governance with care and diligence. I can turn to section 181 that tells directors that they have to act in good faith and in the best interests of the company. Those principles evolved out of years and decades of development of case law. Case law built up that was then enacted by the parliament to give us certainty as to how governance is to be exercised.[29]

2.29 Catholic Health Australia was concerned that the meaning of 'public trust and confidence' would have to await 'first prosecution', when 'it is then tested in the courts at great expense'. It suggested that 'ideally that would be defined in the legislation before it proceeds, and I think that is entirely possible'.[30]

2.30 In its submission, the Housing Industry Association argued that 'Public trust and confidence' was often not relevant to organisations in the not-for-profit sector, as they did not rely on public donations or public money.[31]

2.31 On the other hand, the Not-for-Profit Sector Reform Council saw value in the Commission having the oversight of the sector in the interests of public trust and confidence and that it was an important outcome for the sector:

> It would only take one or two to diminish that trust and confidence. I think that we do not know—the mishmash of regulation and those that have oversight of the sector is so complex and so chaotic that if you had a situation where there was a fundamental failure then the whole sector would have the taint of the scandal because the sector, and particularly those charities that rely on public donation and public support, may find themselves in a situation where there is a decrease in the amount of donations or public support for their charities. By having the

29 Mr Martin Laverty, CHA, *Committee Hansard*, Canberra, 26 July 2012, p. 21.

30 Mr Martin Laverty, CHA, *Committee Hansard*, Canberra, 26 July 2012, p. 23.

31 Housing Industry Association, *Submission 5,* p. 4.

> ACNC there and having a central regulator, you would have that oversight body that would be able to act effectively…[32]

2.32 In the same vein, ACOSS recommended that clause 10-5, the guide to the Act, be redrafted so that it refers to *improving* the accountability of the sector, rather than *supporting* it. Their suggested drafting was:

> 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.[33]

Conclusion

2.33 The charities and not for profit sector has managed itself well and has not had to endure the kind of scandals that have been seen elsewhere in the world which have been the catalyst for regulation. The Committee acknowledges that the sector has sought to be proactive in encouraging a regulatory framework that might help prevent such an event from occurring in the future.

2.34 An increase in public trust and confidence strengthens the sector, with all the flow on benefits of growth in jobs and services in a very large sector of the economy as well as improved outcomes for the people and outcomes they support. Given the important and often essential nature of much of the work of the sector, the impact of a loss of public trust and confidence on the ability to raise funds would flow through, not just to the organisations, the people they employ and services they purchase, but to some very vulnerable people who rely on their services.

2.35 Given the nature and significance of the sector covered by the Bill, the Committee believes that including in the objects of the Bill, 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector' is appropriate.

2.36 However, the Committee recognises that there is some uncertainty in the sector about how the term 'public trust and confidence' will be interpreted and would support the inclusion of further explanation in the Explanatory Memorandum.

2.37 The Committee also supports ACOSS's request to enhance the educative and enabling role of the Commission in improving the accountability of the sector and supports the redrafting of the guide to reflect that.

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32 Ms Linda Lavarch, NSRC, *Committee Hansard*, Canberra, 26 July 2012, p. 19.

33 ACOSS, *Submission 56,* p. 4.

Recommendation 2

2.38 **That the Explanatory Memorandum include material on the meaning of 'public trust and confidence' and the way that it might be interpreted.**

That the guide to the Act reflect the educative and enabling role of the Commission in supporting transparency and accountability in the sector.

Reporting framework

Background

2.39 The reporting framework for registered entities proposed under the Bills will be set out in detail in regulations. The framework is due to commence on 1 July 2013, with extensive public consultation to take place in the meantime. The extended start date is intended to give more time for charities to move to the new regulatory framework and for the Commission to provide guidance to help with the transition. The first financial reports are due to be lodged by 31 December 2014, or later if a substituted accounting period applies.[34]

2.40 As part of the reporting framework, all registered entities will be required to provide an annual information statement. The first annual information statement will be in respect of the 2012-13 financial year, and will need to be lodged with the Commission by 31 December 2013, unless a substituted accounting period applies. Only medium and large entities will be required to provide annual financial reports to the Commission. Large entities will be required to have their financial reports audited, while medium entities can choose to either have a review or an audit.[35]

2.41 Under the Bill, the Commissioner may approve a substituted accounting period, in lieu of a financial year ending 30 June, for a registered entity. Entities that notify the Commissioner, within six months of the commencement date, that they currently report under an Australian law for a period other than a financial year ending 30 June, will be taken to have been approved by the Commissioner (on an ongoing basis) to lodge

34 Treasury, *Explanatory Materials*, pp. 13–14.

35 Treasury, *Explanatory Materials*, p. 59.

their financial report for that other period. That is, existing substituted accounting periods will be grandfathered for such entities provided they notify the Commissioner. The Commissioner's approval to adopt the alternate accounting period will not be required in these cases. Registered entities which report using a substituted accounting period will still report annually. Instead of 31 December, these entities will be required to provide their financial reports to the Commissioner six months after the last day of their accounting period. The Commissioner has the power to impose any conditions that are necessary for this transition.[36]

Analysis

2.42 The reporting framework of the Bill is designed to address the disparate and overlapping reporting requirements that NFP entities are already subjected to under various regulatory regimes.[37] The delayed start to the reporting framework is designed to, 'give charities more time to transition to the new regulatory framework', and enables 'the ACNC to work with the sector to provide guidance and information to facilitate the transition to the new regime'.[38]

2.43 Nonetheless, there is widespread concern within the sector that the reporting regime for the Commission will duplicate existing reporting processes and add another layer of reporting to the sector. In its submission, Chartered Secretaries Australia (CSA) stated:

> The draft legislation does not address the question of how the proposed regime will co-exist with existing parallel legislation …
>
> A key policy objective for the NFP regulatory reform is the creation of a one-stop shop regulator for the sector, and reduced compliance and red tape. Unfortunately, until the question is addressed of how the proposed regime will co-exist with parallel existing legislation, this admirable objective cannot be realised. CSA understands that there are parallel processes occurring to address some of these areas. However, lack of definitive timelines and recommendations leaves the sector uncertain and concerned.[39]

2.44 CSA noted that 'many charities, which were created under state-based incorporated associations legislation, will now be faced with a parallel Commonwealth regulatory and reporting framework'. While welcoming

36 Treasury, *Explanatory Materials*, pp. 64–5.

37 Treasury, *Submission 32*, p. 5.

38 Treasury, *Submission 32*, p. 13.

39 CSA, *Submission 49*, pp. 2–3.

the 12-month extension to reporting obligations contained within the Bill, CSA believed that 'until such time as reporting for the sector is streamlined between Commonwealth and state governments, charities in the first instance (and possibly the entire sector in the future) are likely to be burdened with duplication of reporting'.[40]

2.45 CSA recommended that:

> …in the same vein as the 'basic religious charity' exemption contained in the exposure drafts, consideration should be given to providing the Commissioner with the power/discretion to extend these exemptions to other types of organisations (for example, schools) where extensive reporting and compliance is already in existence and unlikely to be changed or amended as a result of the ACNC legislation, in order to ensure there is no duplication of reporting.[41]

2.46 In evidence before the committee, Catholic Health Australia highlighted the existing regulatory burden facing the health care sector:

> At the moment, a hospital, if it is established under the Corporations Act, needs to report to ASIC; it also needs to report to its state government; and it perhaps has to report to the Private Health Insurance Industry Council. An aged-care organisation needs to report to Accreditation and Standards in the Department of Health and Ageing. We think the opportunity to reduce those reporting obligations is immense, but we do not yet have the confidence that the know-how to do all of that is actually in place.[42]

2.47 A similar burden was placed upon the independent schools sector, with various reporting requirements to different sections of government at federal and state level.[43]

2.48 Catholic Health Australia argued that the purpose of the reforms was to remove duplication of reporting, and asked, 'If it cannot guarantee that at the time of its passage, why support the legislation in its current form?'[44]

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40 CSA, *Submission 49*, p. 4.

41 CSA, *Submission 49*, p. 4.

42 Mr Martin Laverty, CHA, *Committee Hansard*, Canberra, 26 July 2012, p. 22.

43 Mr Bill Daniels and Mr Barry Wallett, ISCA; Dr Geoff Newcombe, AISNSW, *Committee Hansard*, Canberra, 26 July 2012, pp. 27–30.

44 Mr Martin Laverty, CHA, *Committee Hansard*, Canberra, 26 July 2012, p. 24.

2.49 One solution to the problem of duplication offered by Chartered Secretaries Australia was for 'transitional arrangements whereby any charity or not-for-profit currently reporting under state legislation or under the Corporations Act is exempt from reporting under Commonwealth legislation'. This was to be done in conjunction with the referral of powers.[45]

2.50 In its submission, the Victorian Government suggested that 'reporting requirements be streamlined to specifically enable audits and reviews prepared under Victorian legislation to be accepted for the purposes of the ACNC, thus reducing duplication caused by the Commonwealth legislation'.[46]

2.51 In response to these concerns, the Implementation Taskforce noted the work being done to ensure that a more streamlined system would be in place before reporting commenced. It stated:

> Quite a body of work is being scoped at the moment where the ACNC and Treasury will work with individual Commonwealth departments to lay out what the current reporting requirements are, what the ACNC requirements will be both through the annual information statement and, for the medium and larger charities, the financial reporting and then seek to rationalise and indeed reduce what is required. Preliminary discussions on the scoping for that are underway. That has been enabled by the minister on 17 May, giving the additional 12 months for this work to get underway.[47]

2.52 Looking specifically at reporting requirements through MySchool, she noted the potential compatibility of reporting requirements with the Commission and the potential options for eliminating duplication with only minor adjustments:

> If you look at the current requirements of non-government schools to report through the MySchool website and the requirements that the ACNC will have through both the annual information statement and the financial reports, they are really quite close. That is a piece of work that the task force members undertook in the development. They looked at certain types of charities, particularly large groups of charities, to see what the impact might be. There would not be a significant adjustment to reconcile the

45 Mr Tim Sheehy, CSA, *Committee Hansard*, Canberra, 27 July 2012, p. 15.

46 Victorian Government, *Submission 68*, p. 8.

47 Ms Susan Pascoe, ACNCIT, *Committee Hansard*, Canberra, 26 July 2012, pp. 5–6.

> two. I think the key issue is: what is the primary point of entry for the reporting? Do you maintain the MySchool website with possibly some minor adjustments, and does the ACNC then take the data through the MySchool website, or not? In terms of making sure that you maintain the minimum adjustment to the administrative requirements, that would be the question.[48]

Conclusion

2.53 The committee supports the decision of the Government to delay the implementation of the reporting framework under the Bill, and to subject it to further consultation. However, the committee acknowledges that there are some concerns from the sector about reporting duplication. While these problems may ultimately be resolved through negotiation between different Commonwealth agencies and between the Commonwealth and the States and Territories, the committee feels that in the transitional period a flexible approach to reporting arrangements is in order.

2.54 The Committee has some concerns about the complexity involved in transitioning such a diverse community to a single reporting framework. Sector includes aged care, organisations that work with disabled children, and foreign aid organisations. All have substantial reporting requirements. Also, the sector has incorporated associations across all State jurisdictions, cooperatives, etc. It may be an advantage for the Commissioner to be able to 'shelve' some sectors while prioritising others, or accept reports via the department for health and take the information they need from them, or retain Myschool as the principal place for schools to report and take from there.

2.55 The Committee recommends that the Bill be amended to specifically state that the Commissioner has the discretion to accept financial reports and the required material for its purposes from other Government Departments. This capacity should be time limited and reviewed as the lodge-once use-often process is developed. The discretion provides both the Commissioner and the sector with additional flexibility during the transition phase – to concentrate on various sectors before others, - to work with various parts of the sector to get the reporting framework right, and to minimise duplication.

2.56 Having made this recommendation, the Committee considers that it would be a negative unintended consequence if State bodies became the

48 Ms Susan Pascoe, ACNCIT, *Committee Hansard*, Canberra, 27 July 2012, pp. 28–29.

source for reports during the transition phase, as it is the reporting to several State bodies across state borders that contributes a large part of the duplication. The committee anticipates though that State Governments will continue their work with the NFP reform process and work in good faith to reduce duplication.

Recommendation 3

2.57 **That the Commissioner have discretion to accept reports or material prepared for other agencies and levels of government as reports for the purpose of the reporting framework under the Bills. This arrangement should be time limited and be reviewed as the lodge-once use-often process is developed.**

Governance standards

Background

2.58 One of the key conduct requirements for entities under the Bills will be to comply with governance standards, which under clause 45-10, may be specified in the regulations. Under clause 35-10 of the main Bill, non-compliance makes an organisation eligible to have its registration revoked, although the Commissioner must also take a range of other factors into account.

2.59 One issue that arose in relation to these requirements was uncertainty. According to evidence, some parts of the sector are currently unsure about what will be expected of them when the legislation becomes operational. Chartered Secretaries Australia argued that they should be principles-based and adaptable to an organisation's needs:

> On a different note, it is difficult for us to make precise comment on the governance standards as these have not yet been released for public consultation. Nevertheless, we hope they are principles based and flexible. We would like to draw your attention to the ASX Corporate Governance Council's principles and recommendations which have become what we think are the default guidelines on governance, but they are adaptable as they

> operate on an if not, why not basis, and we do hope that the same proposal is adopted with the not-for-profit sector.[49]

2.60 Finally, Catholic Health Australia argued that the governance standards should be legislated into the Bills, rather than left to delegated legislation:

> In relation to the uncertainty around governance standards, we have said that the bill should be amended to ensure that, at a future date, governance standards are enacted as law, not as regulation. Creating a power to have governance standards enacted under regulation makes it too easy for future governments to change those governance standards. At present, if the Corporations Act needs to be amended, it has to go through the process of parliamentary re-enactment. A regulation creates more opportunity for that to be changed.[50]

Analysis

2.61 Treasury responded to most of these points during the hearing. Treasury confirmed that governance standards would be principles based and be flexible to take into account the wide range of organisations in the sector:

> In effect, the governance requirements will be subject to a detailed consultation process. The government has announced that it will undertake consultation in developing those governance requirements, but they would be principles based and have regard to different circumstances of particular charities, given the diverse nature of the sector.[51]

2.62 Further, Treasury reported that the Government has set back the start date for governance standards to July 2013, which will provide enough time for thorough consultations:

> The government is already providing further time for the development of the reporting and governance obligations, in that they will not start until 1 July 2013, and first reports for financial statements will not be until the end of that reporting year. In effect, there are six months from the end of the reporting year before they have to be lodged with the ACNC.
>
> The process that the government is proposing to develop those regulations is to take them through a detailed consultation

49 Mr Tim Sheehy, CSA, *Committee Hansard,* Canberra, 27 July 2012, p. 15.

50 Mr Martin Laverty, CHA, *Committee Hansard,* Canberra, 26 July 2012, pp. 21-22.

51 Mr Martin Jacobs, Treasury, *Committee Hansard,* Canberra, 27 July 2012, p. 33.

> process, so in effect the regulations would be released as an exposure draft, consultation meetings would be set up, and submissions would be sought on the detail of those regulations. We would also work with the states and territories in the development of those regulations… So in that aspect the government is already looking to have the ACNC start from 1 October this year but in effect delay certain aspects of the ACNC operating requirements for a further period of time to allow this further consultation and development to occur.[52]

2.63 In relation to whether the governance standards should be in the Bills, the committee is satisfied that the planned consultation process will be extensive and sufficient, particularly given the extended time frame for compliance.

2.64 However, the committee appreciates the diversity of the sector and the need to match governance standards to the nature and size of vastly different organisations. Governance standards for aged care and for organisations working with children will be of necessity quite different to those suitable for a local parks committee, or a local congregation with a building fund.

2.65 It is also likely that the negotiations required between the Commission and State, Territory and Commonwealth Governments will be more complex in areas like aged care and disability services where the consequences of poor governance are great. The committee acknowledges that some sectors have, or are working on, standards that apply across their membership. The Australian Council for International Development is one example.

Conclusion

2.66 The committee therefore seeks to increase the options of both the Commissioner and the sector in developing governance standards by recommending that the Minister can annex, by regulation, a limited number of existing governance standards to the Bill and that the Commissioner could allow organisations to adopt one of those standards as their own. That would allow discrete sets of organisations, like independent schools, local places of worship, or foreign aid organisations, to develop their own set of governance standards to meet the specific requirements of their circumstances, whether those circumstances require more complex standards, or extremely simple ones.

52 Mr Martin Jacobs, Treasury, *Committee Hansard,* Canberra, 27 July 2012, p. 28.

2.67 There would still need to be a default set of governance standards and a small set of over-arching principles for all registered entities that might relate to issues such as charitable objects and 'fit and proper persons.'

2.68 The committee notes that there are many potential ways open to the Minister, the Commissioner and the sector in working their way through this issue to the most effective and efficient solution. The committee presents this recommendation as an option for their consideration.

Recommendation 4

2.69 **That the Government consider incorporating existing or sector-developed governance standards into the Bill through regulation, in addition to a default set of governance standards.**

Reporting thresholds

Background

2.70 Clause 205-25 of the Bill provides for a tiered system of registration based on revenue thresholds. This has been done in order to minimise the compliance burden placed on registered entities. Reporting requirements under the Bill are proportional to the size of registered entities, based on a revenue threshold. There are three tiers:

- a small registered entity is an entity with annual revenue of less than $250,000;
- a medium registered entity is an entity with annual revenue of less than $1 million that is not a small registered entity; and
- a large registered entity is an entity with annual revenue of $1 million or more.

2.71 Revenue is calculated in accordance with the relevant accounting standards issued by the Australian Accounting Standards Board.[53]

53 Treasury, *Explanatory Materials,* p. 61.

Analysis

2.72 During the inquiry, the Committee received evidence that the proposed thresholds were too low. In its submission, the Anglican Church Diocese of Sydney expressed concern that 'the revenue thresholds used to determine whether a registered entity is small, medium or large remain unhelpfully low'. The submission noted that:

> The thresholds currently proposed are based on those used by States and Territories under incorporated associations legislation and also under the Corporations Act for companies limited by guarantee. We understand it is convenient for these thresholds to be retained, particularly to ensure that that there is minimum impediment for State and Territory agencies agreeing to report to the ACNC as a one-stop shop. However, beyond convenience, there is no obvious basis why these thresholds should be adopted for the whole sector and, in our view, good reason to doubt their suitability as thresholds for the whole sector under the ACNC Bill.[54]

2.73 The submission argued that 'if one of the objects of the ACNC Bill should be to simplify and streamline the regulatory arrangements for the not-for-profit sector, we submit that raising the thresholds for the purposes of defining small, medium and large registered charities would be appropriate'. The submission suggested doubling the level of the thresholds.[55]

2.74 The Independent Schools Council of Australia also protested against the probable impact of the threshold on the independent schools sector—most schools would qualify as large entities with the consequent reporting burden that applied to that tier:

> The vast majority of our schools will be at the high end—that is, revenue will be above $1 million—and $1 million is not much for a school, although some 150 schools might be less than $1 million. Our schools receive very little donation dollars, so if you are regulating organisations that receive gifts from the general public, then schools should be put aside. We do receive government funding and of course that is public money and we acknowledge that. There are several strings attached to receiving that money and the reporting and compliance requirement for receiving that

54 Anglican Church Diocese of Sydney, *Submission 43,* p. 6.

55 Anglican Church Diocese of Sydney, *Submission 43,* pp. 9–10.

> money is extensive. So we already have that covered off. There is very little in the way of public money.[56]

2.75 In its submission, the Australian Major Performing Arts Group (AMPAG) recommended leaving the thresholds at the proposed level but setting them out 'in an attached schedule rather than enshrined in the legislation, to allow for increases in CPI etc'. AMPAG also urged 'the ACNC to inform government of the appropriateness of thresholds over time'.[57]

2.76 In evidence before the committee, Treasury explained the rationale behind the proposed thresholds, and in particular the precedents upon which they are based:

> Smaller registered entities make up 78 per cent of the entire population, and they do not actually have any financial reporting requirements. So, between small, medium and large, the break-up is that 78 per cent are small, 11 per cent are medium and 11 per cent are large. In fact, you might see those as being at the higher end of the scale rather than at the low end of the scale. That said, those thresholds were set in a government review in 2010, established for companies limited by guarantee, after a thorough consultation process. We have had discussions with the states and territories, and their current regulatory regimes, which set thresholds at a lower rate, are all moving to align themselves with the company limited by guarantee levels that we have also adopted as part of the ACNC Bill draft.[58]

2.77 Furthermore, in its submission, Treasury noted that the 'legislation includes a regulation making power which allows for the thresholds to be changed over time'.[59]

Conclusion

2.78 The committee accepts the rationale outlined by Treasury that, while the thresholds may seem high, 78 per cent of registered entities would be classified as small entities. Further, the thresholds match those set for companies limited by guarantee after extensive consultation in 2010. All State and Territory governments are moving their lower thresholds up to match those for companies limited by guarantee, which have now been adopted as part of the Bill.

56 Mr Barry Wallett, ISCA, *Committee Hansard*, Canberra, 26 July 2012, p. 28.

57 Australian Major Performing Arts Group, *Submission 39*, p. 4.

58 Mr Chris Leggett, Treasury, *Committee Hansard*, Canberra, 26 July 2012, p. 5.

59 Treasury, *Submission 32*, p. 13.

2.79 The consistency around the thresholds for companies limited by guarantee, entities registered under State and Territory laws, and those to be registered by the proposed Commission, provide a suitable framework for further negotiations on the reduction of red tape. Changing the thresholds for the Commission alone may create areas of duplication and increased compliance for some organisations that are close to the thresholds. Therefore, the committee supports the thresholds as outlined in the Bills.

2.80 However, the committee notes that the thresholds can be amended by regulation and brings the concerns of the sector to the attention of the Minister and the Commission for consideration at the appropriate time. The committee has also recommended that the Bills include a five year review and the reconsideration of the thresholds may be included in that process.

Privacy and reporting requirements

2.81 One issue raised during the inquiry concerned how much financial information about entities would be disclosed on the Register.[60] The Association of Independent Schools of New South Wales expressed concern that sensitive information such as principals' salaries might be published on the Internet:

> My other comment is on the financial reporting. We are also told that there is a possibility of reporting on the public portal things such as CEOs' principal salaries and the bottom lines of many of our schools. If you have seen what some of the media try to do with league tables and My School information, you will know the delight they will have if they receive this sort of information on a public portal.[61]

2.82 In relation to what will be published on the Register, the committee notes that clause 40-5 of the main Bill, which lists the relevant items, only includes basic information. Some other matters can be included under the regulations, but these will be subject to the disallowance process in the Parliament. Further, clause 40-10 allows the Commissioner to remove certain types of information from the Register. This includes material that

60 For example, Uniting Church in Australia, *Submission 2,* p. [4]; Australian Baptist Ministries, *Submission 16,* p. [8].

61 Dr Geoff Newcombe, AISNSW, *Committee Hansard,* Canberra, 26 July 2012, p. 29.

is commercially sensitive, or has the potential to cause detriment to an entity or to an individual. Therefore, the committee concludes that, not only is there no evidence to suggest that information such as staff salaries will be placed on the Register, but that the Commissioner will have a legislative avenue for not publishing it as well.

Anonymity of private ancillary funds

Background

2.83 Private ancillary funds (PAFs) provide a tax-effective mechanism for individuals to pursue philanthropy in that they receive a tax deduction on monies placed in a PAF, provided at least five per cent of the corpus is distributed annually. PAFs do not receive donations from third parties. Rather, they are location in which individuals can place their own funds for distribution over time.

2.84 PAFs are subject to a high degree of regulatory oversight, which they accept as the price for their favourable tax treatment. In addition, a large amount of aggregate data is published about them through the Queensland University of Technology. In 2009-10, PAFs distributed $197 million to the charitable sector.[62]

2.85 Clause 40-5 in the main Bill describes the information to be placed on the Register. This includes basic entity information, information statements, financial reports, some enforcement history, if any, and data specified in the regulations. Clause 40-10(1) describes what can be removed from the Register, including material that is commercially sensitive, offensive, inaccurate or misleading, or that specified in the regulations.

2.86 Clause 40-10(2) is a general override provision. It states that the Commissioner may include information, or decline to remove it, if the public interest outweighs the criteria in clause 40-10(1), including the regulations.

2.87 PAFs are charitable organisations and will be subject to the Bills. The committee received a number of submissions from philanthropists expressing concern that donor identities could be disclosed under the legislation.[63] At the hearing, Philanthropy Australia argued that

62 Mr David Ward, Philanthropy Australia, *Committee Hansard,* Canberra, 27 July 2012, pp. 53-57.

63 For example, the Myer Family Company, *Submission 25;* Philanthropy Australia, *Submission 20.*

publishing individual data on PAFs would, for many of them, be contrary to the nature of their activities:

> … for some people, giving is a very private activity. They do not seek acknowledgement for it. In fact, some of them think that acknowledgement is almost counterintuitive to the generosity of giving, whether that is from religious or personal reasons. And there are some individuals, for instance, who work as volunteers in not-for-profit organisations and support those organisations through their family philanthropy, and they do not want to be recognised within that volunteering role as being the person that is also funding the organisation, because they just believe that that would be totally inappropriate as far as their personal values are concerned.[64]

2.88 Publishing individual data about PAFs would have two potential negative effects. For example, there could be an increase in unsolicited approaches from groups seeking money. There could also be a reduction of money in PAFs, or at least lower growth, as individuals who highly valued their privacy would reduce their engagement with philanthropy.[65]

2.89 The Community Council of Australia supported philanthropists' request for anonymity at the individual level.[66]

Analysis

2.90 At the hearing, the committee questioned Treasury about the Government's intentions in relation to PAFs. Treasury confirmed that the regulations were likely to accommodate their concerns:

> During consultations, a number of those consulted raised with us concerns, particularly in the private ancillary fund space, particularly around the privacy of individual donors, and this is the group that we have in mind when the government goes about developing those regulations.[67]

2.91 Philanthropy Australia acknowledged and appreciated this intention, but also argued that the public interest provisions in sub-clause 40-10(2) raised too much uncertainty for its membership. It also commented that the

64 Mr David Ward, Philanthropy Australia, *Committee Hansard,* Canberra, 27 July 2012, p. 54.

65 Mr David Ward, Philanthropy Australia, *Committee Hansard,* Canberra, 27 July 2012, pp. 54, 56.

66 Mr David Crosbie, CCA, *Committee Hansard,* Canberra, 27 July 2012, p. 8.

67 Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 5.

public interest would already be reflected in the regulations, which would be promulgated by the Government and subject to Parliamentary scrutiny:

> The current draft has provision for the minister to issue regulations and … it is indicated that these regulations could, for instance, be used to protect private information. That is seen as something that could happen rather than something that will happen. We are happy with that intention. The one specific clause is, I think, clause 40-10(2) which gives the commissioner the ability to override any regulation if they think it is in the public interest. To our minds, if the minister issues a regulation, the public interest has been taken into account at that point and, therefore, we would have thought, a regulation from the Governor-General should not be overridden by the commissioner.[68]

Conclusion

2.92 The committee appreciates the contribution of PAFs to the sector and also notes the large degree of regulatory oversight and aggregate reporting to which they are subject. The committee also understands that, for many private donors, anonymity goes to the very nature of philanthropy.

2.93 PAFs by nature do not accept donations from the public or from other parties. While the committee can see the benefits to the community of being able to see the scale and range of PAFs, the committee can see no public benefit in publishing the names of private donors where they seek to keep their philanthropy private. Therefore, the committee recommends that the Government investigate ways to strengthen protection in the Bill for these private donors. In making this recommendation, the committee makes no comment on whether other non-identifying information about PAFs may be published.

Recommendation 5

2.94 **The Government investigate ways to strengthen protection in the Bills for private donors who wish to keep their philanthropy private.**

68 Mr David Ward, Philanthropy Australia, *Committee Hansard,* Canberra, 27 July 2012, p. 54.

Likelihood of conduct sufficient grounds for enforcement action

2.95 In parts of the main Bill, such as clause 35-10(1)(c) in relation to revoking registration, the Commissioner may take enforcement action if they reasonably believe that something is likely to occur. Examples are a contravention of the legislation or non-compliance with a governance standard, or an external conduct standard.

2.96 The 'likelihood standard' represents a greater than 50 per cent chance of something occurring. In the inquiry, stakeholders argued that the likelihood standard was too low for the Commissioner to take enforcement action and that a greater probability of something occurring should be required.[69] In evidence, ACOSS argued for a 'reasonable belief' test:

> I think the commission that is almost here will have a culture of early intervention and of creating good relationships with the entities involved. There is plenty of scope for early intervention through practice directions, but the ability to warn, direct and fine should be confined to reasonable belief that there has been noncompliance.[70]

2.97 The committee notes that varying degrees of probability are required in different areas of the general law. For example, in civil matters a 50 per cent test is sufficient. In criminal matters, 'beyond reasonable doubt,' which is well above a 50 per cent probability, is often applied.

2.98 The key point here for the committee is that the Commissioner must take into account a range of matters before taking enforcement action. In clause 35-10(2) of the main Bill, for example, the Commissioner takes into account the 'nature, significance and persistence' of misconduct. The committee's expectation is that, for the more serious types of misconduct, the Commissioner is more likely to act when they conclude that something is likely to happen. Conversely, if there is a 50 per cent chance of less serious misconduct occurring, the committee expects that the Commissioner would be less likely to intervene.

2.99 In other words, the Bills allow the Commissioner to respond in a proportional manner to varying circumstances. Therefore, the committee

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69 For example, Catholic Diocese of Bunbury, *Submission 65,* p. 5; NSW Government, *Submission 66,* p. 8.

70 Dr Cassandra Goldie, ACOSS, *Committee Hansard,* Canberra, 26 July 2012, p. 41.

does not see value in restricting the Commissioner by applying a reasonable belief test, rather than a likelihood test.

Directors' liability

Background

2.100 Division 180 of the Bill deals with obligations, liabilities and offences under the Act, and provides that:

> If an entity (the primary entity) is subject to an obligation or liability, or commits an offence, certain entities that are responsible for managing the primary entity may also be subject to the obligation or liability, or commit the offences, in specific situations.[71]

2.101 In effect, the bill imposes personal liability on directors of bodies corporate in certain circumstances.

2.102 However, under the Bill, only one offence, being an offence against the requirement to comply with a direction from the Commissioner under clause 85-30 of the Bill, that is committed by a body corporate, is taken to have been committed by the body corporate and each director of the body corporate at the time the body corporate committed the offence. Directors will not be taken to have committed any other offence, besides a failure to comply with a direction from the Commission, under the Bill. The rationale for this power is that:

> An offence arising from a failure to comply with a direction from the ACNC Commissioner is considered to be a serious offence, as the ACNC Commissioner would generally be expected to use other means of encouraging compliance with the Bill before issuing a direction. In these cases, it is appropriate that the directors be taken to have personally committed the offence.[72]

2.103 Treasury notes that directors 'will only be personally liable for the liabilities of the body corporate in cases of dishonesty, gross negligence, recklessness, or a deliberate act or omission'. Treasury further notes 'that this test is used in other contexts, and has an established meaning'.[73]

71 Australian Charities and Not-for-profits Commission Bill 2012, s. 180-1.

72 Treasury, *Explanatory Materials*, p. 200.

73 Treasury, *Submission 32.1,* p. 4.

2.104 Directors have two defences available to them:

> The offence will not apply to a director of a body corporate if, because of illness or for some other good reason, it would have been unreasonable to expect the director to take part, and the director did not take part, in the management of the body corporate at any time when the offence was committed.
>
> The offence will also not apply to the directors of a body corporate, if the director took all reasonable steps to ensure that the body corporate did not commit the offence, or there were no such steps the director could have taken.[74]

2.105 The evidential burden for proving these defences lies with the director; however, the evidential burden for proving the offence remains with the Commissioner.[75]

Analysis

2.106 The Committee has received a considerable amount of evidence bearing on this issue, most of it expressing concern about the application and effect of these provisions.[76]

2.107 In evidence before the Committee, the Australian Institute of Company Directors (AICD) questioned the value of placing liabilities on people who were essentially volunteers working for the community:

> This bill, on its face, adds to the liabilities all these people have under the corporate law. It concerns me massively that we might be the first country in the world to make being on a not-for-profit as a director more onerous than being on a for-profit. It seems we must definitely identify what is happening with the corporate obligations before we decide to put extra obligations on the not-for-profit sector directors.
>
> The second thing is that there is personal liability given to essentially volunteers. This has been looked at in other situations and, indeed, steered against. It seems quite wrong that people who are giving out of the goodness of their hearts, being proper people, should not be given the benefit of the corporate veil.[77]

74 Treasury, *Explanatory Materials,* p. 200.

75 Treasury, *Explanatory Materials,* pp. 200–01.

76 See for example, Sector Seven Consulting Pty Ltd, *Submission 40,* pp. 10–11.

77 Mr David Gonski AC, AICD, *Committee Hansard*, Canberra, 27 July 2012, p. 13.

2.108 In a submission to the inquiry, AICD noted that 'Section 180-5(1) of the Bill gives the directors the *same obligations* as the company. Section 180-5(1) therefore has the effect of piercing the corporate veil.' AICD argued that, in effect, 'the section fails to appreciate the legal effect of incorporation, in that upon incorporation the company becomes its own legal person separate from its directors.' It also stated that 'Section 180-5(1) makes no distinction between the obligations or legal requirements of the company (as a legal person) and the obligations of the directors (as separate legal persons). As such there is no distinction between what the company must do and what a director must do.'[78]

2.109 AICD wanted the liability provisions in the Bill redrafted 'so that they are clear, straightforward and easily understood', and stated that:

> Before the liability and offence provisions in the Bill can be re-drafted and finalised:
>
> a) all of the obligations (including any director's duties, external conduct standards, governance standards and reporting requirements); and
>
> b) the intended interaction of the Bill with the Corporations Act must be set out and opened for public consultation.[79]

2.110 AICD also argued that 'the Bill should impose less onerous liabilities upon directors that act in a volunteer capacity'.[80]

2.111 Chartered Secretaries Australia also questioned the extent of liabilities imposed under the Bill, stating that it was more onerous than that under corporate law:

> The bill also imposes obligations, liabilities and offences on covered entities and that is those responsible for managing the registered not-for-profit entity, and where the registered not-for-profit entity is an unincorporated association the effect of the provisions is to impose all of the obligations as well as the liabilities of the unincorporated association on each member of the committee of management at the time the obligation arises or the liability becomes payable and to render any offence of the unincorporated association as being taken to have been committed by each member of the committee of management. Those liabilities

78 Australian Institute of Company Directors, *Submission 42.1*, p. 2.

79 Australian Institute of Company Directors, *Submission 42.1*, p. 3.

80 Australian Institute of Company Directors, *Submission 42.1*, p. 3.

> and obligations are far more than are imposed on directors under the Corporations Act.[81]

2.112 AICD suggested amending the liability provisions of the Bill to focus upon dishonest, grossly negligent or reckless behaviour, and removing liability for a deliberate act or omission of the director, arguing that this would better reflect the circumstances of the not-for-profit sector:

> The first bit would be potentially fine if you are only liable where it was 'reckless' et cetera. But in relation to the second bit, where it arises from an omission or act, take, for example, a board of a school—maybe a school for the disabled or whatever. They could well take an act—for example, an act to build a building or to employ a person or whatever—and then, if it is not within the regulations or it is not dealt with properly, the way I read it, they have a liability, irrespective of whether they were honest or dishonest.
>
> The second point I would make is if it is decided by the committee that this is all rectified by removing 'omission or act' and just making it 'recklessness' et cetera—which I think by the way is getting close to the point—I would still make the point that I think it is not good to have legislation which says, 'You are liable, but by the way if you come within this exemption you are not.' It seems to me that that is not really what we are trying to do or what I would be suggesting to you we should be trying to do, which is to foster volunteerism in the sector. It would be much better to say, 'They are not liable if they act properly et cetera, but if it can be proved that they have acted improperly then that is a different thing.'[82]

2.113 AICD requested a conditional carve-out for directors of charities serving on a voluntary basis, with liability limited to criminal actions. Their submission stated:

> We believe that an important policy objective of the NFP reforms should be to encourage volunteerism. We have previously noted that a high proportion of directors in the NFP sector serve on a voluntary basis. As a starting point these directors should be supported in their efforts. With this in mind, we believe as a matter of principle that there should be an explicit carve-out or safe harbour from liability (across all relevant Acts imposing

81 Ms Judith Fox, CSA, *Committee Hansard*, Canberra, 27 July 2012, p. 16.

82 Mr David Gonski AC, AICD, *Committee Hansard*, Canberra, 27 July 2012, p. 16.

> liability on a charity director) where a director of a charity serves on a voluntary basis.
>
> We accept there would need to be some limitation on the extent of the carve-out, such as where the director has been involved in a criminal act. In this regard, we note exclusions from liability that exist in various Acts, including the *Civil Liability Act 2002* (NSW) (see Part 9 of that Act). Again, however, we would emphasize that these issues should be the subject of full and proper public consultation.[83]

2.114 Other witnesses argued for removing director liability from the Bill altogether.[84]

2.115 In evidence before the Committee, Treasury expressed concern that the purpose and scope of the directors' liability provisions had not been understood, that the provisions were much more limited in scope than people were allowing:

> We had best correct some misunderstandings. It is probably a reflection that early exposure drafts were filed wider and they were narrowed quite dramatically in scope subsequent to the issue of those original exposure drafts. I suppose, consistent with other Commonwealth, state and territory laws currently applying to charities, such as the Corporations Act and the Tax Act, the ACNC legislation imposes a number of obligations on directors of incorporated charities to ensure that the individuals do not seek to hide behind the protection of a corporate veil to protect themselves from acts of deliberate misconduct. However, unlike some of the other laws, only in very limited circumstances will directors be held liable for breaches of the ACNC Act. Those cases are where the director was the direct cause of a breach because they undertook a deliberate act that was knowingly a breach or they were acting dishonestly, with gross negligence or recklessness. Further, there is only one offence that applies to a director within the ACNC Act—that is, a failure to follow a direction of the commissioner. Such a direction can only be issued in the most serious of cases and disobeying such an order is a serious matter that needs an appropriate sanction.[85]

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83 Australian Institute of Company Directors, *Submission 42.1*, pp. 5–6.

84 Mr John Colvin, AICD, *Committee Hansard*, Canberra, 27 July 2012, p. 16; Mr David Crosbie, CCA, *Committee Hansard*, Canberra, 27 July 2012, p. 3.

85 Mr Chris Leggett, Treasury, *Committee Hansard*, Canberra, 27 July 2012, p. 29.

2.116 Treasury has also refuted claims that the director liability regime contained in the draft Bill is more onerous than that applying to large for-profit companies, stating:

> This is not the case, as the governance standards are expected to be simplified, tailored for the NFP sector, and otherwise modified to take into consideration comments made during the consultation process. On 17 May 2012, the Government announced that the revised governance standards will be subject to further consultation and implemented through regulations.[86]

2.117 Nonetheless, Treasury has undertaken to review aspects of the liability regime:

> Some stakeholders queried whether a 'deliberate act or omission' should be qualified with a reasonableness test, or some other requirement that the act or omission needs to occur knowingly in contravention of the law. This is the intention of the draft legislation, and to the extent that this intention is not clear, Treasury will examine options to clarify the drafting of this provision in consultation with the Office of Parliamentary Counsel (OPC).[87]

Conclusion

2.118 The committee is concerned that either the directors' liability regime is unduly onerous, as suggested by a significant portion of expert evidence presented to the committee, or that, as presented in the Bill, it is not sufficiently comprehensible for people to understand its intent or purported mode of operation. The committee understands the importance of not providing disincentives for people to work in responsible positions in the not-for-profit sector. Placing an unnecessary burden of liability could be seen as such a disincentive, which is opposed to the purpose and objects of the Bill. The committee therefore recommends that Treasury redraft this section of the legislation with a view to clarifying its intent and operation.

86 Treasury, *Submission 32.1,* p. 4.

87 Treasury, *Submission 32.1,* p. 4.

Recommendation 6

2.119 **The Committee recommends that Treasury redraft Division 180—Obligations, liabilities and offences, of the Australian Charities and Not-for-profits Commission Bill 2012, with a view to clarifying its intent and operation.**

Procedural fairness

Background

2.120 Division 35 of the Bill provides the Commissioner with the power to revoke the registration of entities and the power to revoke the registration of an entity as a type of entity or subtype of entity. The Bill details the grounds for revocation and provides, in line with other clauses of the Bill, that the entity has a right to object to a decision in line with the review and appeals provisions outlined in Part 7-2 of the Bill.[88]

2.121 Division 100 of the Bill provides the Commissioner with power to suspend or remove responsible entities and to appoint acting responsible entities. The Bill details the grounds for suspension or removal of an entity and provides, in line with other clauses of the Bill, that the entity has a right to object to a decision in line with the review and appeals provisions outlined in Part 7-2 of the Bill.[89]

2.122 In addition, the Bill provides the Commission a wide spectrum of enforcement powers for where the Commission's educative function fails to induce required action. The range of enforcement powers the Bill provides is intended to enable the Commission to take strong, proportional and targeted action to address actions or lack of actions that could threaten public trust and confidence in the NFP sector.

2.123 This Bill provides the Commission with the authority to:

- issue warning notices;
- issue directions;
- enter into enforceable undertakings;

88 Treasury, *Explanatory Materials,* p. 26.

89 Treasury, *Explanatory Materials,* p. 123.

- apply to the courts for injunctions;
- suspend or remove responsible entities; and
- appoint acting responsible entities.[90]

2.124 Clause 40-5 details information to be published on the ACN Register, including the details of the following matters (including a summary of why the matter arose, details regarding any response by the relevant registered entity and the resolution (if any) of the matter):

(i) each warning issued to a registered entity by the Commissioner under Division 80;

(ii) each direction issued to a registered entity by the Commissioner under Division 85;

(iii) each undertaking given by a registered entity and accepted by the Commissioner under Division 90;

(iv) each injunction (including interim injunctions) made under Division 95;

(v) each suspension or removal made under Division 100.[91]

Analysis

2.125 The issue of procedural fairness, particularly around the issue of refusal or revocation of registration of an entity, was one of the issues highlighted in the evidence presented to the Committee. ACOSS stated:

> …we raise again the issue of procedural fairness and the absence of explicit directions around procedural fairness within the bill. While we note that these are issues that the ACNC task force has been looking at in terms of its consultation with the sector, again the question before the committee and the question that the sector is asking is: what are the safeguards and the appropriate mechanisms in this bill that will ensure the mechanisms around procedural fairness carry through the legislative framework? That is what we look to in terms of a series of recommendations around insertions within the bill that will provide that guarantee for the sector.[92]

90 Treasury, *Explanatory Materials,* p. 97.

91 Australian Charities and Not-for-profits Commission Bill 2012, s. 40-5 (f).

92 Dr Tessa Boyd-Caine, ACOSS, *Committee Hansard*, Canberra, 26 July 2012, p. 36.

2.126 Sector Seven was also concerned about the lack of procedural fairness provisions in the Bill and urged the adoption of similar provisions from the Corporations or National Consumer Credit Protection Acts. The submission stated:

> There is no requirement in the Bill for the ACNC to give the NFP entity procedural fairness through written submissions or a hearing (unlike the Corporations and NCCP Acts). There are provisions for procedural fairness in respect of revocation but given the implications of revocation, we believe these provisions should replicate the provisions set out in the Corporations and NCCP Acts. Under the Bill, the ACNC must issue a 'show cause' notice where it believes 'on reasonable grounds that a registered entity is not entitled to be registered'. The notice must set out the grounds on which the notice is given and invite the entity to provide a written response within 28 days. There is no provision for a hearing (as required under the Corporations and the NCCP Acts) and the ACNC may dispense with the show cause notice if 'in the opinion of the ACNC it is reasonable to do so'. It should also be noted that there are no circumstances in which ASIC may suspend or cancel a licence without first giving notice.
>
> In summary, there are well established principles in the Corporations and the NCCP Acts for procedural fairness that we suggest should be incorporated in the Bill. In our submission, these provisions would not unduly complicate the process and ensure both the ACNC and the NFP entity were properly and effectively apprised of the key issues in dispute before embarking on a more expensive and time consuming appeal process.[93]

2.127 In its submission, the Not-for-profit Project at the University of Melbourne Law School also expressed concern at 'the absence of appropriate procedural fairness requirements in relation to the ACNC's exercise of its powers to revoke an entity's registration (Div 35) and the suspension and removal of responsible entities (Div 100)'. It noted that 'both outcomes are quite severe sanctions and would ordinarily attract the obligations of procedural fairness'. While approving of the review provisions surrounding these decision making powers, the submission felt that the Bill 'confuses procedural fairness with administrative review', and further stated:

93 Sector Seven Consulting Pty Ltd, *Submission 40*, p. 3.

> Imposing clear legislative obligations on the ACNC in relation to the procedures by which it makes significant regulatory decisions ensures that decisions are made properly at first instance and increases public confidence in the regulator. Without such provisions, the ACNC is left in great uncertainty as to whether it has fulfilled its obligations and increases the likelihood that its decisions will be challenged on the grounds that it has failed to provide procedural fairness in accordance with its common law obligations. It also leaves the Bill out of step with every other major piece of Commonwealth regulatory legislation, all of which clearly define the procedural steps for hearings and notices prior to regulatory decisions being made.
>
> Including provisions in the Bill for a general opportunity to be heard prior to a decision being made is fairer, more flexible, and more likely to produce accurate decisions than the option for the review of decisions. It is fairer because it permits an entity to respond to a claim before an administrative decision is made, which may have significant practical and reputational consequences. It is more flexible because, once a decision is made the relatively formal process of objection is required.
>
> Administratively, there may be benefits in allowing organisations to clarify concerns held by the regulator without triggering the review process. Finally, it promotes accurate decision making because decisions will be made after appropriate information is laid before the regulator.[94]

2.128 In its submission, the Public Interest Law Clearing House expressed concern about the lack of prior notification of adverse findings or enforcement actions, and particularly the potential effects of the publication of such matters on the ACN Register. The submission stated:

> In particular, Divisions 80 and 85 of the Bill provide scope for the ACNC to provide directions and formal warnings to entities in contravention of (or likely to contravene) a provision of the Bill, and for such actions to be noted on the Register in accordance with Division 40. The consequences of publishing such a warning on the Register should not be understated, particularly as charities are reliant on their public reputation and perception. A reference on the Register to a formal direction or warning issued against a charity has significant repercussions, and for this reason we

94 Not-for-profit Project, University of Melbourne Law School, *Submission 67*, pp. 5–6.

> submit that there ought to be a stated procedure in the Bill that accords with principles of natural justice and procedural fairness. While it may be the intent of the ACNC to engage in informal discussions with non-compliant charities prior to issuing formal warnings, the procedure ought to be recognised in legislation.[95]

2.129 The Public Interest Law Clearing House recommended that 'the Bill incorporate principles of natural justice and procedural fairness prior to an adverse decision being made in relation to a registered entity'.[96]

2.130 In response to these concerns, Treasury emphasised existing precedents for the review and appeals framework of the Bill.[97] Treasury noted that:

> The draft legislation provides a review and appeals framework, which is modelled closely on the existing review and appeals framework in Part IVC of the *Taxation Administration Act 1953* (TAA). Entities that apply for a review, or appeal a decision taken by the ACNC Commissioner are required to comply with the decision being reviewed until it is overturned. As such, the framework set out in the draft legislation is consistent with standard practice. Consultation was undertaken on the review and appeals framework in the draft ACNC legislation, and there was strong support for a model based on Part IVC of the TAA.

Conclusion

2.131 The committee acknowledges the sector's concerns about the lack of procedural fairness in the provisions of the Bill. The committee is of the view that in matters as serious as those covered by Division 35 and Division 100 of the Bill, the Commissioner should provide written notice of intent and an opportunity for the entity to be heard, before a decision is enforced. However, the committee also recognises that there can be some situations where immediate action is necessary, such as when a fraud or other criminal act is imminent. The Commissioner should be exempt from these provisions if it is satisfied that the circumstances require immediate action.

2.132 The Committee agrees that the effect of publication upon the ACNC Register of adverse findings and enforcement actions upon registered entities should not be underestimated. The Committee believes that provision should be made in clause 40-5 for the removal of such details

95 Public Interest Law Clearing House, *Submission 64*, p. 7.

96 Public Interest Law Clearing House, *Submission 64*, p. 7.

97 Mr Chris Leggett, Treasury, *Committee Hansard*, Canberra, 27 July 2012, pp. 33–34.

from the Register once an appropriate amount of time has elapsed, the matters in question have been resolved and there are no public interest grounds for retaining the information. Furthermore, as a matter of procedural fairness, the Commission should provide written notification to registered entities of the Commission's intention to publish information under clause 40-5(f).

Recommendation 7

2.133 **The Committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be amended to provide that the Commissioner provide written notice of intent, and an opportunity for the entity to be heard, before a decision is enforced to revoke the registration of an entity or suspending or remove responsible entities.**

The Commissioner should be exempt from these provisions if they are satisfied that the circumstances require immediate action.

Recommendation 8

2.134 **The Committee recommends that clause 40-5 of the Australian Charities and Not-for-profits Commission Bill 2012 be amended to:**

- **require the Commissioner to provide written notice of intent to the relevant registered entity, and an opportunity for the entity to be heard, prior to publication of the Commission's intention to publish information under clause 40-5(f); and**
- **allow the details of matters published on the ACNC Register under clause 40-5(f) to be removed from the register once an appropriate amount of time has elapsed, the matters in question have been resolved and there is no public interest grounds for retaining the information.**

The administrative penalty regime

Background

2.135 Administrative penalties are imposed by Commonwealth agencies without the need for court action. The Bills propose two offences to be subject to administrative penalties. The first is the making of false or misleading statements. The penalty amounts are:

- 20 penalty units ($2,200) where the false or misleading statement was due to a failure to take reasonable care to comply with the Act;
- 40 penalty units ($4,400) for recklessness; and
- 60 penalty units ($6,600) for intentional disregard.

2.136 The penalty can be increased or decreased by 20 per cent where the entity sought to obstruct the Commissioner or voluntarily disclose the error to the Commissioner, respectively.

2.137 If an entity fails to lodge documents on time, the base penalty amount is 1 penalty unit ($110) for each 28 day period that the document is late, up to a maximum of 5 penalty units. This base amount applies to small entities. It is doubled for medium entities and multiplied by five for large entities.

2.138 Administrative penalties will be payable within 14 days of the Commissioner issuing the penalty notice. The Commissioner may remit part of or the entire penalty. If they do not remit the entire penalty, they must provide reasons to the entity. The general interest charge (GIC) will apply to unpaid penalty amounts and will be collectable by the ATO.

2.139 The Government does not expect that administrative penalties will be imposed frequently. However, it argues that appropriate sanctions are required for a deterrent effect and to protect those who seek to cooperate with the Commissioner. The regime is proportional and takes into account the conduct of the entity involved.[98]

2.140 The administrative penalty regime was criticised during the inquiry because of the perception that the Commissioner must impose an administrative penalty for these two offences. If this is the case, then the offences must then be notified to the entity and the ATO, regardless of whether the penalty is remitted. The regime is based on that applying in

98 Treasury, *Explanatory Materials,* pp. 187-94.

tax administration and was criticised as being too heavy-handed for the charitable sector.[99] The Public Interest Law Clearing House stated in its submission:

> While we appreciate that the ACNC must be notified of certain matters on a timely basis to ensure the Register remains current, we submit that it ought to maintain discretion over whether it issues notices of liability for such breaches. While we note that the Bill does provide the ACNC with the ability to remit all or part of an administrative penalty once notified, it is less than ideal for the ACNC to have to notify an entity of its liability, only to subsequently remit in circumstances where, for example, the failure to notify was an oversight reasonable in the circumstances. This is also important given clause 175-70 of the Bill compels the ACNC to notify the ATO each time a notice is issued, regardless of whether the intent is to remit liability. This undermines the independence of the ACNC and this obligation should either be removed, or greater discretion should be vested in the ACNC on whether to issue a notice in the first place.
>
> The Objects of the Bill recognise 'the principle of proportionate regulation', however the structure of the administrative penalty regime is such that there is strict liability for any failure to notify the Commission of certain events, or lodge documents on time. While there has been some degree of concession for small registered entities in relation to the length of time to notify the Commissioner of certain events (60 as opposed to 28 days), we submit that a discretion which allows the Commissioner to address non-compliance without a liability notification would be useful and consistent with the stated object of assisting registered entities in complying with and understanding the legislation by providing charities with guidance and education.[100]

Analysis

2.141 By way of comparison, the committee examined similar provisions in the State and Territory associations legislation. For false or misleading statements:

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99 ACOSS, *Submission 56.1,* p. 4; Sector Seven Consulting Pty Ltd, *Submission 40,* p. 9; Not for profit Project, Melbourne University Law School, *Submission 67,* pp. 7-8.

100 PILCH, *Submission 64,* pp. 5-6.

- New South Wales provides for an offence under its general criminal law of imprisonment for two years and a fine of 200 penalty units, or $22,000 (sections 307B and 307C of the *Crimes Act 1900*);
- Victoria provides for an offence of 60 penalty units, or $8,450.40 (section 49 of the *Associations Incorporation Act 1981*); and
- Queensland provides for an offence with a maximum penalty of 10 penalty units, or $1,000 (section 121A of the *Associations Incorporation Act 1981*).

2.142 For failure to lodge a document:

- New South Wales provides for an offence for larger entities in relation to submitting financial statements of 5 penalty units, or $550 (section 45 of the *Associations Incorporation Act 2009*);
- Victoria provides for an offence in relation to submitting financial statements of 5 penalty units, or $704.20 (section 30 of the *Associations Incorporation Act 1981*); and
- Queensland provides for an offence in relation to submitting financial statements with a maximum penalty of 4 penalty units, or $400 (section 121A of the *Associations Incorporation Act 1981*).

2.143 The proposed penalty amounts in the Bills for false or misleading statements are lower than two of the listed jurisdictions, but above that for Queensland. The proposed penalty amounts in the Bills for failure to lodge a document tend to be higher, especially for larger entities. However, the committee expects that larger entities would be more likely to be supervised at the Commonwealth level and smaller entities would register at the State and Territory level. Treasury acknowledged that penalty amounts had been reduced following initial consultations.[101] The committee concurs that the proposed penalties are roughly comparable with State and Territory amounts.

2.144 In examining the Bill, however, the committee is not convinced that the Commissioner is without a discretion in relation to administrative penalties. For example, there is no statement in the legislation that states there is no discretion and the committee's understanding of the Bill is that a discretion applies.

101 Treasury, *Submission 32,* p. 22.

Conclusion

2.145 The Committee acknowledges that the penalty amounts in the proposed legislation for false and misleading statements and failure to lodge are roughly comparable with State and Territory provisions. This was not contested during the inquiry.

2.146 What was contentious was the perception that the Bills propose a system whereby the Commissioner must impose an administrative penalty for these offences and advise the ATO of this, regardless of whether the Commissioner remits the penalty. The committee's understanding is that a discretion is available and would like to see this matter clarified in the Explanatory Memorandum to the Bills.

Recommendation 9

2.147 **The Explanatory Memorandum to the Bills clarify that the Commissioner has a discretion not to impose an administrative penalty.**

Review of the Act

Background

2.148 In its submission, Moores Legal Pty Ltd recommended the Bill include a provision for an automatic review of the legislation after five years. The submission noted that 'such a provision is warranted given the importance of reducing the regulatory burden on Not for Profit entities and the fact that it is likely to only be achieved over time (with the cooperation of the States and Territories'. It noted similar provision in the *Charities Act 2006* (UK).[102] This suggestion was also raised in evidence before the Committee at its public hearing on 27 July 2012.[103]

> … and one of the issues that have been picked up in one of the written submissions—No. 45—but that I have not seen mentioned this morning is the need for a five-year review. I think that in any redraft a five-year review would be a good idea.

102 Moores Legal Pty Ltd, *Submission 36*, p. 1.

103 Dr Matthew Turnour, *Committee Hansard*, Canberra, 27 July 2012, p. 22.

Analysis

2.149 The committee notes that five-year reviews of legislation can be mandated in Commonwealth legislation, although this is by no means universal. Examples are:

- section 61A of the *Australian Crime Commission Act 2002;*
- section 72 of the *Fuel Quality Standards Act 2000;*
- section 76A of the *National Greenhouse And Energy Reporting Act 2007;*
- section 37 of the *Governance Of Australian Government Superannuation Schemes Act 2011;* and
- Section 64 of the *National Environment Protection Council Act 1994*.

Conclusion

2.150 The committee is of the view that, given the complexity of the legislation, and the challenges in its implementation, it would be useful for the new laws to be subject to a thoroughgoing review after five years, with a view to identifying problems and suggesting improvements.

Recommendation 10

2.151 **The Committee recommends that the Australian Charities and Not-for-profits Commission Bill 2012 be amended to provide for a review of the legislation after it has been in operation for five years.**

Overall conclusion

2.152 These Bills have been a long time coming. A national regulator for the sector was first proposed in 2001 and has been a consistent theme in reviews of the sector since then. Charities and not-for-profits have been subject to an inefficient regulatory framework spread across many agencies and more than one level of government. The Bills offer a way to remedy this.

2.153 The sector itself supports the change. Bodies in the sector must prove their bona fides each time they deal with government, and they anticipate the day when this information is located in one easily accessible place.

2.154 The Bills will establish an independent, national regulator for the sector. Charities and not-for-profits will provide streamlined information to the Commission, which will determine their charitable status and pass on officially required data to other Commonwealth agencies, including the ATO. It will implement flexible, proportional regulation in accordance with entities' size and through graduated enforcement powers such as warnings and enforceable undertakings.

2.155 In major reforms such as these Bills, stakeholder uncertainty is a major risk and the committee appreciates that some organisations are apprehensive about them. The committee examined a number of issues, such as financial reporting, and concluded that the regulatory details will be covered in upcoming consultations and that there is substantial time before these matters must be finalised. What will be of benefit for the sector is for the legislation to pass and the new Commissioner to be formally appointed so that they can work with the sector in finalising requirements and explaining the practical details of how the legislation will work. The Not-for-profit Sector Reform Council made this argument in evidence:

> Given that the government has taken on board the sector's request for further time to discuss and be consulted in relation to the reporting requirements and the governance standards, it can take on its role from day one to be engaged in those consultations about how it will implement its requirements under the legislation.[104]

2.156 Broadly, the committee covered three major policy areas in the inquiry. The first is the capacity of the Commission to reduce red tape. Work has already begun. The Commonwealth is seeking to 'turn off' any duplication, such as reports to ASIC or other Commonwealth agencies. It is also discussing whether States and Territories might wish to do the same with their associations legislation to the extent that these organisations are covered by the Bills. This is a long term project, but the committee is confident that, over time, duplication will be minimised.

2.157 The second policy area was the liability of directors, trustees and management committees for the conduct of their organisations. Key stakeholders were very concerned about how these provisions would operate and the committee found the legislation and explanatory materials very confusing. For the sake of clarity, the committee has recommended that these provisions should be redrafted.

104 Ms Linda Lavarch, NSRC, *Committee Hansard,* Canberra, 26 July 2012, p. 18.

2.158 The third main policy area revolved around procedural fairness. The committee has recommended that the Commission notify entities prior to enforcement action.

2.159 There have been considerable efforts to harmonise business regulation across the country recently, and it is only fair that a similar process occurs for the charities and not-for-profits sector. The sector holds great hope that the Bills will deliver this result and the committee agrees that, with some amendments, this will occur. The Bills should pass.

Recommendation 11

2.160 **Subject to the recommendations in this report, the House pass the Australian Charities and Not-for-profits Bill 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012.**

Julie Owens MP
Chair
9 August 2012

Dissenting report – Liberal Members of the committee

Introduction

The *Australian Charities and Not-for-Profits Commission Bill 2012* and the *Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012* would establish a new independent statutory office, the Australian Charities and Not-for-profits Commission (the "ACNC") which will be the Commonwealth level regulator for the not-for-profit ("NFP") sector. The exposure draft also establishes a new regulatory framework for the NFP sector.

The objects of the Bill are to maintain, protect and enhance the public trust and confidence in the NFP sector and to support and sustain a robust, vibrant, independent and innovative NFP sector[1]. Although the Government has claimed the creation of the ACNC will reduce red tape and avoid duplication[2], Liberal members of the Committee are concerned that the ACNC will instead add another layer of regulation to the operation of most not-for-profit charities, many of whom are already struggling with the regulations currently imposed by Commonwealth and State agencies. These concerns have been born out in the evidence presented to the Committee.

Moreover, the Liberal members of the Committee remain concerned that the Government has failed to establish any mischief which would necessitate the government to legislate to "protect and enhance the public trust and confidence in the NFP sector". Indeed, it is the view of the Liberal members of the Committee

[1] Exposure Draft, p. 14.

[2] Exposure Draft, p. 13.

that the penalties proposed in the draft Bills are excessively onerous, short-sighted, and will serve to deter future involvement in the voluntary sector.

As many elements crucial to practical the operation of this legislation have been left to the Minister to determine by Regulation, the Liberal members of the Committee share the sector's concerns in relation to the lack of certainty this provides for charities.

It is the view of the Liberal members of the Committee that the Government has failed to establish how the ACNC will interact with other State and Federal Government agencies to reduce the duplication of regulation across the sector. The Government has failed to satisfy the Liberal members of the Committee that any progress has been made with key agencies such as the Department of Education, Employment and Workplace Relations in relation to this process, or with the State governments through COAG. The Liberal members of the Committee are convinced that if agreement in this space is not reached, these Bills will result in an additional layer of bureaucracy and regulatory burden for not-for-profit agencies already struggling to meet the current demands of government.

The Liberal members of the Committee are concerned of the real risk that these Bills may lead to erosion of the privacy of Private Ancillary Funds, which will serve to discourage family investment in these endeavours to the detriment of the general community.

Liberal members of the Committee are concerned that the Government has failed to adequately respond to and address the matters raised by sector agencies throughout the consultation process for these Bills. Moreover, the Liberal members of the Committee believe the consultation process has been rushed, with the sector being provided as little as nine working days in some cases to make submissions throughout the drafting process.

The Liberal members of the committee have taken the opportunity to highlight in this dissenting report a number of serious concerns with the bills and, based on the reasons outlined, recommend they not be passed in their current form.

Regulatory burden

The Liberal members of the Committee have formed the view that these Bills will add a further burdensome layer of regulation to the operation of not-for-profit agencies, many of whom are already struggling with the current framework, described by Martin Jacobs, Principal Adviser in the Philanthropy and Resource

Tax Division of Treasury as imposing *"a considerable compliance burden on entities, which can unnecessarily hamper their valuable work.[3]"*

It was made clear during the course of the public hearings that duplication and overlap between Commonwealth and State and Territory laws governing the work of not-for-profit agencies was a key contributor to the compliance burden currently borne by sector agencies. The Gillard government argues that the ACNC will *"reduce red tape through processes to avoid or minimise duplication where possible[4]."* However, as Susan Pascoe, Head of the Australian Charities and Not-for-Profits Commission Implementation Taskforce stated, full red-tape reduction could only be achieved *"with the involvement of the states and territories[5]."* These comments were further supported by the Chair of the Not- for-Profit Sector Reform Council Linda Lavarch, who stated:

"Removing the current regulatory duplication and providing a one-stop shop for not-for-profits can only be achieved through a collaboration between the Commonwealth, state and territory governments.[6]"

Following the evidence presented to the Inquiry, the Liberal members of the Committee believe that any significant reduction in red tape is only going to be realised once there is an agreement in place between the Commonwealth and the States and Territories to harmonise their laws in relation to the not-for-profit sector. No such agreement is currently in place.

The Liberal members of the Committee are concerned that no real progress is being made by the Government in its attempts to have the states come on board. At present, it seems there is only a 'belief' by Government that the states and territories will follow course and amend their laws in line with these Bills[7] with no real evidence to support this conclusion. However, as stated by Bill Daniels, Executive Director of Independent Schools Council of Australia:

"There has been no discussion whatsoever with the states or, indeed, with the Commonwealth department that I am aware of that has involved the independent sector on any reduction in reporting requirements.[8]"

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[3] Mr Martin Jacobs, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 2.

[4] Exposure Draft, p. 13.

[5] Ms Susan Pascoe, Australian Charities and Not-for-Profits Commission Implementation Taskforce, *Committee Hansard,* Canberra, 26 July 2012, p. 15.

[6] Ms Linda Lavarch, Not-for-Profit Sector Reform Council, *Committee Hansard,* Canberra, 26 July 2012, p. 17.

[7] Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 4.

[8] Mr Bill Daniels, Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 29.

Moreover, the Liberal members of the Committee believe that until such time as an agreement between the Commonwealth and the states is in place, the ACNC will add an additional layer of regulation to the operation of most not-for-profit charities. Indeed, Chris Leggett, Manager of the Philanthropy and Exemptions Unit of Treasury, conceded that:

"There will be further time when there will be some overlap (of regulation) with the states and territories[9]"

A number of not-for-profits also expressed concerns about the additional red tape being imposed by these Bills in their submissions to the Inquiry.

Catholic Health Australia submits that *"the effect of the Bills would be to add additional regulation to the operation of most not-for-profit organisations.[10]"*

The Uniting Church in Australia writes that:

"It is important to recognise that the introduction of any new reporting obligation on congregations, no matter how minor, will be another layer of legislative obligation and reporting for local members who are generally neither skilled nor trained for this burden.[11]"

Dr Ted Flack states:

"For those registered as charities under State fundraising legislation and those funded through State Government agreements3, the establishment of the ACNC will substantially add to the compliance burden of Australian charities and not reduce them.[12]"

The Housing Industry Association submits that *"Some of the proposed provisions will increase regulatory costs and compliance without any public or private benefit.[13]"* They further state:

"HIA considers that it is conceptually difficult to reduce red tape by adding red tape, which is what adding new Commonwealth regulation on top of existing State regulation

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[9] Mr Chris Leggett, Treasury, *Committee Hansard,* Canberra, 26 July 2012, p. 6.

[10] Catholic Health Australia, *Submission 1,* p. 1, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[11] Uniting Church in Australia, *Submission 2,* p. 2, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[12] Dr Ted Flack, *Submission 4,* p. 3, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[13] Housing Industry Association Ltd, *Submission 5,* p. 4, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

will do. Only if States vacate the field is there any hope of reducing the administrative burden on Charities and NFPs.[14]"

The Conservation Council of South Australia writes *"[Whilst there is] a national "one-stop-shop" and a "report-once, use-often" process, there remains a major problem in that at this stage state regulation will continue to apply.[15]"*

Surf Life Saving New South Wales makes the comment that:

"Reducing red-tape by reducing duplication of reporting requirements and assisting the efficiencies of the sector...will not occur without the involvement of the states and territories to align reporting requirements with the ACNC reporting framework.[16]"

And the Chamber of Commerce and Industry of Western Australia recommends:

"...That the Commonwealth address its own jurisdictional red tape with a view of reduce the administrative burden on the sector. In other words, the Bill needs to go further to support the Commonwealth's own reform again in respect of reducing red tape and unnecessary duplication.[17]"

Sector agencies have also expressed concerns that the objects clause in the Bill does not make any specific mention of reducing red tape. As submitted by the Australian Council of Social Services:

"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.[18]"

These comments are echoed by Linda Lavarch in her evidence to the Inquiry:

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[14]Housing Industry Association Ltd, *Submission 5,* p. 5, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[15] Conservation Council of South Australia, *Submission 19,* p. 6, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[16] Surf Life Saving NSW, *Submission 23,* p. 1, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[17] Chamber of Commerce and Industry of Western Australia (Inc), *Submission 21,* p. 2, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[18] Australian Council of Social Service (ACOSS), *Submission 56,* p. 3, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

"We are concerned that the preamble and the objects do not reflect one of the original intentions of the ACNC, which was to reduce red tape for the not-for-profit sector. The focus of the current draft does not provide any detail on how the reporting burden for registered organisations would be reduced.[19]*"*

Following the evidence presented to the Inquiry, the Liberal members of the Committee are not convinced that these Bills will contribute to a significant reduction in red tape for the not-for-profit sector. Moreover, it is our contention that these Bills will increase the regulatory burden being placed on these agencies by adding an additional layer of compliance that the sector will have to meet. The Liberal members of the Committee have formed the view, consistent with the evidence presented to the Inquiry that the states and territories must align their laws in relation to the not-for-profit sector with the Commonwealth if the ACNC is to be successful in reducing the compliance burden faced by sector agencies. The Liberal members of the Committee are not satisfied with the progress that has been made by the Government in achieving such harmonisation. It is our belief that any such agreement is a long way from being reached, and that, to introduce these Bills in the absence of such an agreement would be to the detriment of the sector as a whole, which will have to endure months, possibly years of increased regulation with scant likelihood of this ever being pared back.

Moreover, the Liberal members of the Committee are not satisfied that these Bills go far enough in making direct provisions to reduce red tape. We are particularly concerned that there is no direct link between the reduction of red tape and the objectives and functions of the ACNC.

The Liberal members of the Committee believe the reduction of red tape should be a priority issue where any reform of the not-for-profit space is concerned, and it is our contention that these Bills will have a detrimental impact on such an objective.

Harmonisation across government agencies

As previously noted, the Liberal members of the Committee are concerned that these Bills will create an additional layer of red tape to the operation of not-for-profit agencies. One of the key issues identified in contributing to this is the overlap of state and territory requirements with those of the ACNC; another key contributor as identified in the Inquiry is the overlap of regulation across Commonwealth Departments. This is of particular concern to independent schools, which will fall within the jurisdiction of the ACNC.

[19] Ms Linda Lavarch, Not-for-Profit Sector Reform Council, *Committee Hansard,* Canberra, 26 July 2012, p. 17.

Independent schools will be required to report much of the information to the ACNC that they currently report to the Department of Education and Workplace Relation (DEEWR), as well as to state education authorities. Setting aside the issue of duplication with state authorities, if an information-sharing agreement is not reached between the ACNC and DEEWR, the ACNC will effectively serve as an additional layer of regulation and red tape for independent schools many of whom are already, in the words of Dr Geoff Newcombe, *"drowning in compliance.[20]"*

Powers and penalties

A number of sector agencies have expressed concerns that the powers and penalties contained within these Bills are heavy handed and may deter members of the public from taking up voluntary roles within sector agencies. The Liberal members of the Committee share these concerns.

Dr Geoff Newcombe, Executive Director of the Association of Independent Schools of New South Wales and Representative of the Independent Schools Council of Australia raised the issue of independent schools being captured by these Bills. Adding:

"The commentary – it is not advice – that we have received from the AICD and our lawyers is that the proposed legislation is likely to shift the obligations from the company to the directors or, if you like, it will erode the concept of limited liability of directors.[21]

Dr Newcombe further stated that:

"If that is the case and the concept of limited liability goes and liability is shifted from the company to the individual director, knowing the pressure on school boards even at the moment I think you would find many people – they are all volunteers – who would think twice about staying on school boards. It is the school board that manages the school.[22]"

Dr Newcombe raised concerns that the proposed changes would *"decimate school boards.[23]"*

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[20] Dr Geoff Newcombe, Association of Independent Schools of New South Wales and Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 31.

[21] Dr Geoff Newcombe, Association of Independent Schools of New South Wales and Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 29.

[22] Dr Geoff Newcombe, Association of Independent Schools of New South Wales and Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 33.

[23] Dr Geoff Newcombe, Association of Independent Schools of New South Wales and Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 29.

David Gonski of the Australian Institute of Company Directors expressed concerns that parts of the Bill *"in fact will not support nor sustain a robust, vibrant and independent sector,[24]"* and further stated that the changes would not *"foster volunteerism in the sector.[25]"*

Mr Gonski expressed concerns that:

"Directors of these [tiny organisations] ... may not want to branch out and make these not-for-profits do really well because they would be scared that they may not be able to adhere to a black-letter law approach.[26]"

He further stated that, as a result of the proposed changes, *"we might be the first country in the world to make being on a not-for-profit as a director more onerous than being on a for-profit.[27]"*

Ewen Crouch, Chairman of Mission Australia raised the issue of the scope and exercise of the ACNC's powers, stating:

"I do believe that the information-gathering, monitoring and sanctioning powers, including the ability to remove a director, are very heavy-handed. I would think they would be quite problematic from a regulator's perspective. It is not something that any other regulator in Australia has any experience with and I do wonder why this regulator would want to have those powers and whether they would know how to use them.[28]"

Eve Brown, Senior Policy Manager of Trustees at Financial Services Australia raised the issue that:

"With regard to the reporting requirements, the governance standards and the ACNC enforcement powers, we point out that these provisions are inconsistent with or overlap the common law of trusts and state and territory trustee legislation, inconsistent with or overlap the Corporations Law and ASIC's regulatory role, inconsistent with or overlap the ATO's guidelines on public and private ancillary funds, and are possibly inconsistent with the Australian Constitution and inconsistent with the overarching purpose of the ACNC draft legislation.[29]"

CEO & Managing Director of the Australian Institute of Company Directors, John Colvin, questioned the need to *"have a system in Australia, which would make us a laughing-stock around the world, of having liabilities for volunteers greater than those for for-profits.[30]"*

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[24] Mr David Gonski AC, *Committee Hansard,* Canberra, 27 July 2012, p. 13.

[25] Mr David Gonski AC, *Committee Hansard,* Canberra, 27 July 2012, p. 16.

[26] Mr David Gonski AC, *Committee Hansard,* Canberra, 27 July 2012, p. 18.

[27] Mr David Gonski AC, *Committee Hansard,* Canberra, 27 July 2012, p. 13.

[28] Mr Ewen Crouch, Mission Australia, *Committee Hansard,* Canberra, 27 July 2012, p. 18.

[29] Ms Eve Brown, Financial Services Council, *Committee Hansard,* Canberra, 27 July 2012, p. 15.

[30] Mr John Colvin, Australian Institute of Company Directors, *Committee Hansard,* Canberra, 27 July

Dr Matthew Turnour further expressed concerns that the outcome of the Bills would be to discourage volunteerism in Australia, stating *"every time you introduce more regulation, you discourage more volunteers. It really can be very hard to get people to volunteer when they know that there is potentially personal liability attached.[31]"*

Dr Tessa Boyd-Caine, Deputy Chief Executive Officer of the Australian Council of Social Service flagged concerns regarding the enforcement powers contained within the Bills, particularly with regard to revocation of registration:

"Because there is no capacity to stay a decision in that area, we see potential for organisations to be deregistered in advance of capacity for appeals, in advance of administrative review of decision making that might well overturn a decision. The consequences of that on a charity are incredibly significant, not least including the withdrawal of charity concessions, which in some cases will undermine a charity's capacity to continue operating.[32]"

Dr Boyd-Caine also expressed concerns regarding the proportionality and appropriateness of some of the sanctions included within the Bill:

"What we fear at the moment is a skew in the bill towards a series of administrative penalties that are more significant than they ought to be in terms of maintaining proportionality with other regulatory frameworks but also with the risks that this sector presents.[33]"

Liberal members of the Committee are of the view that the Gillard Government has failed to establish the mischief which would necessitate a new set of powers and penalties of the scope of which are provided for in this Bill being introduced for the not-for-profit sector. As stated by Martin Laverty, CEO of Catholic Health Australia:

"Our principal concern is that we have not yet seen what problem actually exists that requires the establishment of a new body of law – a new principle at law – to oversee public trust and confidence. It is our view that the Corporations Act currently provides like capacity for government to regulate those circumstances – few and far between as they are – that might give rise to the potential for such a power to have been created.[34]" (p. 21)

The Liberal members of the Committee believe the powers and penalties contained within these Bills are heavy handed, unnecessary and excessive, and we are concerned that they will have a detrimental impact on Australia's culture of

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2012, p. 16.

[31] Dr Matthew Turnour, *Committee Hansard,* Canberra, 27 July 2012, p. 22.

[32] Dr Tessa Boyd-Caine, Australian Council of Social Service, *Committee Hansard,* Canberra, 26 July 2012, p. 36.

[33] Dr Tessa Boyd-Caine, Australian Council of Social Service, *Committee Hansard,* Canberra, 26 July 2012, p. 36.

[34] Mr Martin Laverty, Catholic Health Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 21.

volunteering. The Liberal members of the Committee are of the view that the Government has failed to satisfactorily make out the mischief which would justify the adoption of such powers and penalties where the consequences of adopting such provisions are potentially dire for the ongoing strength and vibrancy of the not-for-profit sector.

Lack of certainty

A number of submissions to the Inquiry have raised the issue that the Bill creates uncertainty with regard to what is required of sector agencies and the directors of these agencies. Dr Mark Shying, Senior Policy Adviser in the External Reporting division of Certified Practising Accountants Australia outlined these concerns as follows:

"We believe that the legislation and the regulations must provide certainty as to the obligations and responsibilities of both the entity and those charged with governance of the entity, and at present we believe that that certainty is not there. In particular, we are concerned about certainty from the point of view of the financial reporting requirements – that is, the requirements of the financial report are not presently specified and the requirements of those charged with governance in respect of those financial reports are not specified....We believe it is not appropriate to leave that unknown whilst we have entities that need to consider what their responsibilities are as they go forward and whether or not they need to make small changes or significant changes to what they currently do.[35]"

Martin Laverty of Catholic Health Australia echoed these comments, saying *"we cannot look to the bill today and have any confidence or indeed certainty as to how in the future those organisations currently governed under the corporations law would be governed in the future.[36]"*

Mr Laverty further stated:

"The principal problem with the bill is that right now I cannot say to any of the chairs or the boards of directors of our organisations that from the time of the enacting of this bill, and indeed in the years ahead as more of the powers of commissions come to be, this is the framework from within which you will govern your organisations.[37]"

It is clear from the Inquiry that the primary cause of uncertainty in relation to the Bill relates to governance standards, which are to be enacted at a future date as

[35] Dr Mark Shying, Certified Practising Accountants Australia, *Committee Hansard,* Canberra, 27 July 2012, p. 14.

[36] Mr Martin Laverty, Catholic Health Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 21.

[37] Mr Martin Laverty, Catholic Health Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 21.

regulation. The Liberal members of the Committee are concerned that this will lead to a situation where sector agencies have limited input into decisions regarding how they are to be governed. Moreover, it exposes the risk that these standards can be subject to change frequently and at the whim of the Minister or the government of the day.

The Liberal members of the Committee believe not-for-profit agencies deserve ongoing certainty as to how they are to be governed. It is our contention that these Bills fail to achieve that objective and that this will place further burden on sector agencies going forward.

Privacy

The Liberal members of the Committee are concerned that these Bills will erode the privacy of Private Ancillary Funds (PAFs) and thus discourage these philanthropic endeavours to the detriment of the community.

In their submission to the Inquiry, the Myer Family Company raised objections to the treatment of PAFs by the ACNC:

"Clause 40-10 (2) of the legislation suggests the ACNC Commissioner will have discretion to still publish information if he/she considers it is in the public interest to do so…We strongly recommend that the Regulations state that all information relating to PAFs be withheld from the Register and that PAFs report to the ACNC in a similar fashion to their existing reporting to the ATO, as stipulated in the PAF Guidelines. PAFs could choose to be public.[38]"

The Myer Family Company further stated:

"A significant number of existing founders of PAFs that we have spoken to are appalled at the breach of trust relating to the possibility that family foundations that were established within rules stating that they would be private, would now suddenly become public in nature. Many would simply wind up.[39]"

Philanthropy Australia also identified the proposed treatment of PAFs by the ACNC as a point of concern which may dissuade persons from setting up PAFs:

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[38] The Myer Family Company, *Submission 25,* p. 2, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[39] The Myer Family Company, *Submission 25,* p. 1, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

"We cannot see any policy benefit in requiring public disclosure of private information about private trusts, particularly given this was explicitly rejected in 2009. There is a significant danger that such a change, if implemented, would cut short the building momentum of community engagement and philanthropy in Australia, because public disclosure is strongly opposed by many who of those who already have PAFs and those who have the interest and capacity to set one up.[40]"

The Liberal members of the Committee share the concerns as outlined in these submissions, and believe the proposed changes to the treatment of PAFs poses a significant threat to the ongoing culture of private philanthropy in Australia.

Consultation process

The Liberal members of the Committee have serious concerns about the time frame provided to the sector for feedback on these Bills.

In many instances, sector agencies were provided as little as nine working days to make submissions on important aspects of the Exposure Draft. The Liberal members of the Committee note that in December 2011, charities wishing to make a submission were required to do so in a two-week period over the Christmas break, requiring them to divert staff away from front-line services in what is one of the busiest times of the year for service delivery.

Deputy Executive Director of the Independent Schools Council of Australia Barry Wallett made the point that his organisation had *"always been concerned about the time frame to rush this (the creation of the ACNC). From our perspective we cannot see the need to rush it.[41]"*

Mr Wallett further echoed the public and private concerns of many stakeholders within the not-for-profit sector, stating:

"For us to respond in a very short time frame to legislation that could have a major impact depending on some unknowns – we do not have a definition of 'charity' yet and have not seen the regulations et cetera – it puts a burden on the organisations to get adequate feedback in the time it was done.[42]"

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[40] Philanthropy Australia, *Submission 20,* p. 3, from the House of Representatives Standing Committee on Economics, Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

[41] Mr Barry Wallett, Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 31.

[42] Mr Barry Wallett, Independent Schools Council of Australia, *Committee Hansard,* Canberra, 26 July 2012, p. 31.

The Liberal members of the Committee are of the view that the consultation process has been unnecessarily rushed, and that this has placed a significant burden on sector agencies. As these Bills make fundamental ongoing changes to the legal treatment of not-for-profit organisations, the Liberal members of the Committee believes the consultation process should be afforded greater time to ensure the issues as outlined above are addressed to the satisfaction of the sector. At present, we are not satisfied that this has been the case.

Conclusion

The Liberal members of the Committee believe the Inquiry has raised a number of serious issues with these Bills which lead us to conclude that these Bills in their current form will serve as a threat to the strength and vibrancy of the not-for-profit sector going forward.

Liberal members of the Committee believe these Bills will result in a duplication of regulation and red tape for not-for-profit agencies, many of whom are already struggling to meet the overlapping requirements of various Commonwealth and State agencies. The Inquiry has heard that a harmonisation of laws between the Commonwealth and the States and Territories is essential to ensuring a reduction of red tape for sector agencies, however, the Liberal members of the Committee are not satisfied that the Government has made any significant progress in achieving this. Furthermore, we are not satisfied that the Government has made progress in establishing information-sharing arrangements across Commonwealth Departments. Without these agreements in place, the Liberal members of the Committee believe the ACNC will create an additional layer of bureaucratic red tape and regulation for not-for-profit agencies, particularly for independent schools. The Liberal members of the Committee believe this additional layer of red tape will further threaten the continued operation of many sector agencies that are being increasingly forced to divert resources away from front line services and towards complying with the demands of government.

The Inquiry has also heard concerns that the powers and penalties contained within these Bills are heavy handed, and the Liberal members of the Committee share these concerns, particularly with regard to information-gathering, monitoring and sanctioning powers, and the ability of the ACNC to remove a director. We have heard the sector express concerns that these provisions will deter involvement in the sector going forward, and the Liberal members of the Committee share this view. The Liberal members of the Committee are not satisfied that the Government has made out any mischief worthy of imposing a

system of penalties which may see Australia as the first country in the world to make being a not-for-profit director more onerous than being a for-profit director.

We have heard a number of sector agencies express concerns that these Bills create uncertainty with regard to what is required of sector agencies and the directors of these agencies, particularly as a set of governance standards are yet to be agreed to and will be determined by legislative instrument. The Liberal members of the Committee believe this exposes the risk of these standards being frequently subject to change at the whim of the Minister and the government of the day. The Liberal members of the Committee believe not-for-profit agencies deserve ongoing certainty as to how they are to be governed. It is our contention that these Bills fail to achieve that objective and that this will place further burden on sector agencies going forward.

The Liberal members of the Committee believe the proposed changes to the treatment of Private Ancillary Funds will discourage these philanthropic endeavours to the detriment of the community and believe this is an unintended consequence which has been overlooked by the Government in the drafting of this legislation.

Liberal Members of the Committee believe the Government has rushed the consultation process with the sector, and that this has placed a significant burden on these agencies. The Liberal members of the Committee are not satisfied that the consultation process has been sufficiently rigorous as to address the concerns that many sector agencies have with these Bills.

For the reasons outlined above, the Liberal members of the Committee do not support the passage of these Bills.

Recommendation: that these Bills not be supported.

Steven Ciobo MP
Deputy Chair

Kelly O'Dwyer MP

Scott Buchholz MP

A

Appendix A – Submissions and exhibits

Submissions

No.

1. Catholic Health Australia
2. Uniting Church in Australia
3. Australian Catholic Bishops Conference
4. Dr Ted Flack
5. Housing Industry Association Ltd
6. National Roundtable of Non profit Organisations
7. Carers Australia's
8. Mr Alan Fotheringham
9. The Smith Family
10. Mr John Church

10.1 Supplementary to submission 10:
Mr John Church

11. Primrose Solutions Pty Ltd
12. St Vincent de Paul Society
13. Research Australia
14. Consumers Health Forum of Australia
15. Uniting Care Australia
16. Australian Baptist Ministries

17. Catholic Social Services Australia
18. Fox and Thomas Lawyers Brisbane
19. Conservation Council of South Australia
20. Philanthropy Australia
21. Chamber of Commerce and Industry of Western Australia (Inc)
22. The Salvation Army Australia
23. Surf Life Saving NSW
24. YWCA Australia
25. The Myer Family Company's
26. Mr Chris Osborn
27. Community Employers WA
28. Office for the Not-For-Profit Sector
29. Mission Australia

29.1 Supplementary to submission 29:
Mission Australia

30. Makinson & d'Apice, Lawyers
31. RSM Bird Cameron Charted Accountants
32. The Treasury

32.1 Supplementary to submission 33:
The Treasury

33. Australian Conservation Foundation
34. National Disability Service
35. Independent School Council of Australia
36. Add Ministry In
37. Change Makers Australia

38 Australian Council for International Development

39. Australian Major Performing Arts Group
40. Sector Seven Consulting Pty Ltd
41. Certified Practise Accountants

42. Australian Institute of Company Directors

42.1 Supplementary to submission 43:
Australian Institute of Company Directors

43. Anglican Church Diocese of Sydney

43.1 Supplementary to submission 43:
Anglican Church Diocese of Sydney

44. Council for Australia

45. Moore's Legal

46. The Institute of Chartered Accountants in Australia

47. Financial Services Council's

48. Moore Stephens Accountants and Advisors

49. Chartered Secretaries Australia Ltd

50. Confidential

51. Confidential

52. Confidential

53. Confidential

54. Confidential

55. Bahá'í Centre

56. Australian Council of Social Service (ACOSS)

56.1 Supplementary to submission 56:
Australian Council of Social Service (ACOSS)

57. ECH Inc

58. Heart Foundation

59. RSPCA

60. Fundraising Institute Australia

61. World Vision Australia

62. Grant Thornton Australia

63. Missions Interlink

64. Public Interest Law Clearing House (PILCH)

65. Catholic Diocese of Bunbury
66. NSW Government
67. Victoria Government
68. University of Melbourne
69. Department of the Prime Minister & Cabinet
70. Finance Industry Delegation
71. Australian Chamber of Commerce and Industry
72. The Presbyterian Church (NSW) Property Trust
73. Confidential

List of Exhibits

No.

1. Diagram of the NFP reform agenda '3 foci of the reform agenda'
Department of the Prime Minister & Cabinet (provided by Mr Paul Ronalds)

2 National Compact: working together
Department of the Prime Minister & Cabinet (provided by Mr Paul Ronalds)

3 Strength, Innovation and Growth – The future of Australia's not–for-profit sector
Department of the Prime Minister & Cabinet (provided by Mr Paul Ronalds)

4 Neumann & Turnour Lawyers-Submission, Scoping study for a national not-for-profit regulator, Consultation Paper – January 2011 (provided by Neumann & Turnour Lawyers)

B

Appendix B – Hearings and witnesses

Thursday, 26 July 2012, Canberra

Department of Prime Minister and Cabinet

Mr Paul Ronalds, First Assistant Secretary

Mr Michael Perusco, Assistant Secretary

Department of the Treasury

Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit

Mr Martin Jacobs, A/g Principal Adviser, Philanthropy and Exemptions Unit

Ms Ronita Ram, Policy Analyst, Philanthropy and Exemptions Unit

Australian Charities and Not-for-profits Commission

Ms Susan Pascoe, Head of the Australian Charities and Not-for-profits Commission Implementation Taskforce

Not-for-profit Sector Reform Council

Ms Linda Lavarch, Chair

Catholic Health Australia

Mr Martin Laverty, Chief Executive Officer

Independent Schools Council of Australia

Mr Bill Daniels, Executive Director

Mr Barry Wallett, Deputy Executive Director

Association of Independent Schools of NSW

Dr Geoff Newcombe, Executive Director

Australian Council of Social Service

Dr Cassandra Goldie, Chief Executive Officer

Dr Tessa Boyd-Caine, Deputy Chief Executive officer

Public Hearing-Friday, 27 July 2012, Canberra

Community Council of Australia

Mr David Crosbie, Chief Executive Officer

Royal Society for the Prevention of Cruelty to Animals Australia

Ms Heather Neil, Chief Executive Officer

World Vision Australia

Mrs Tanya Fletcher, Legal Counsel

The Australian Institute of Company Directors

Mr John H C Colvin, Chief Executive Officer and Managing Director

Mr David Gonski AC, Fellow

Mr Ewen Crouch, Chair, Law Committee

Chartered Secretaries Australia

Mr Tim Sheehy, Chief Executive

Ms Judith Fox, Director, Policy

Certified Public Accountants Australia

Dr Mark Shying, Senior Policy Adviser, External Reporting

Financial Services Council

Ms Eve Brown, Senior Policy Manager, Trustees

Public Interest Law Clearing House

Dr Juanita Pope

Neumann & Turnour Lawyers

Dr Mathew Turnour

Melbourne Law School, University of Melbourne

Professor Ann O'Connell, Chief Investigator, Not-For-Profit Project

The Treasury

Mr Chris Leggett, Manager, Philanthropy and Exemptions Unit

Mr Martin Jacobs, A/g Principal Adviser, Philanthropy and Exemptions Unit

Ms Ronita Ram, Policy Analyst, Philanthropy and Exemptions Unit

Australian Charities and Not-for-Profits Commission Implementation Taskforce

Ms Susan Pascoe, Head of the Australian Charities and Not-for-profits Commission Implementation Taskforce

Mr Murray Baird, Assistant Commissioner, General Counsel

Anglican Diocese of Sydney

Mr Robert Wicks, Diocesan Secretary

Australian Catholic Bishops Conference

Rev Brian Lucas, General Secretary

Uniting Church in Australia

Mr Jim Mein, National Coordinator for Uniting Church ACNC and NFP Reforms

UnitingCare Australia

Mr Joseph Zabar, Director, Services Sustainability

The Smith Family

Dr Lisa O'Brien, Chief Executive Officer

Ms Anne Hampshire, Head of Research and Advocacy

The Salvation Army

Major Kevin Alley, National Secretary

Mr John McIntosh, Adviser

Philanthropy Australia

Mr David Ward, Treasurer

C

Appendix C – List of advisory reports

Below is a list of advisory reports tabled by the House of Representatives Standing Committee on Economics in the 43rd Parliament.

No.

1. Inquiry into the Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011; and the Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011
2. Inquiry into Indigenous economic development in Queensland and advisory report on the Wild Rivers (Environmental Management) Bill 2010
3. Advisory report on the Taxation of Alternative Fuels Bills 2011
4. Advisory report on the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011
5. Advisory report on the Competition and Consumer (Price Signalling) Amendment Bill 2010 and the Competition and Consumer Amendment Bill (No. 1) 2011
6. Advisory report on the Food Standards Amendment (Truth in Labelling - Palm Oil) Bill 2011
7. Advisory report on the Corporations (Fees) Amendment Bill 2011
8. Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011

9. Advisory report on the Minerals Resource Rent Tax Bill 2011 and related bills
10. Review of the Tax Laws Amendment (2011 No. 9 Measures) Bill 2011
11. Review of the Insurance Contracts Amendment Bill 2011
12. Advisory report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012
13. Advisory report on the Clean Energy Finance Corporation, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012 and Clean Energy (Excise Tariff Legislation Amendment) Bill 2012
14. Advisory Report on the Tax Laws Amendment (2012 Measures No. 2) Bill 2012; Pay As You Go Withholding Non-compliance Tax Bill 2012; Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012; Passenger Movement Charge Amendment Bill 2012
15. Advisory Report on the Tax Laws Amendment (Managed Investment Trust Withholding Tax) Bill 2012
16. Advisory Report on the Tax Laws Amendment (2012 Measures No. 4) Bill 2012
17. Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012