



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE
General Secretariat

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The Secretary
House Standing Committee on Economics
Parliament House
CANBERRA ACT 2600
economics.reps@aph.gov.au

Dear Secretary

Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills

The Catholic Church in Australia and its agencies (the Church) contribute in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes, modes of governance, and are subject to varying types and levels of government regulation.

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The ACBC is aware of the sector-specific submissions of Catholic Health Australia and Catholic Social Services Australia and particularly notes the concerns of entities in those sectors, already subject to significant regulation, that there will be additional onerous red tape and duplication of reporting and governance requirements.

The ACBC appreciates the improvements to the Australian Charities and Not-for-profits Commission Bill 2012 (ACNC Bill) and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (Transitional Bill) as a result of consultation and wishes to bring to the Committee's attention some further issues that if addressed will improve the effectiveness of the legislation.

GENERAL ISSUES

This submission will address the following four continuing underlying problems with the proposed legislation, and then outline some concerns with specific aspects of the ACNC Bill:

- extra red tape because of duplication of reporting requirements;
- outstanding legislative matters, where a number of key details are yet to be clarified;
- the enforcement powers in the bills; and
- the meaning of public trust and confidence.

Duplication of reporting requirements

A principal tenet of the Australian Labor Party's Not-for-profit (NFP) reform policy statement for the 2010 election was that its NFP reform legislation would reduce unnecessary administrative compliance and duplication of reporting by NFP agencies, thereby enabling NFP agencies to direct more of their limited resources into core functions. This commitment appears to be reflected in the Regulatory Impact Statement (RIS) attached to the Explanatory Materials (EM) (p 247 17.5).

Under the prominent heading of "Problem", it states that the challenge to be addressed is one of a regulatory framework that is "fragmented and inconsistent; uncoordinated with regulatory responsibilities spread across a range of government agencies; [and] producing complex reporting requirements which are, in certain situations, overlapping". Building on this, the EM asserts that "the sector's new regulatory system will establish a robust and streamlined regulatory framework for the NFP sector, including a 'report once - use often' reporting framework" (p4).

The ACNC Bill reinforces this point in noting that the Australian Charities and Not-for-profits Commission (ACNC) must have regard to benefits gained from minimising procedural requirements and procedural duplication by co-operating with other government agencies and effective administration (Section 15-10(f)).

Yet, the ACNC Bill provides no basis for confidence that, as a result of this legislation, either the ACNC or any other Commonwealth agency is required to take action to establish such a "robust and streamlined regulatory framework". After 18 months of consultation on these matters and taking account of the significant new requirements placed on many charities, the ACNC Bill fails to provide any basis for the reporting requirements by companies limited by guarantee to be transferred to an ACNC; for relevant parts of the NFP reporting requirements of Commonwealth agencies to be transferred to an ACNC; or for any clear commitment to obtaining the agreement to any rationalisation of government reporting requirements between the ACNC and relevant State and Territory authorities.

In simple terms, there is no basis in the legislation for confidence that the "Problem" identified in the Regulatory Impact Statement would start to be addressed in a significant way if this ACNC Bill is enacted. The rationale for the ACNC continues to be compromised and the obligations of regulated entities are made more complex with the additional reporting and compliance obligations which the ACNC Bill imposes.

If this unsatisfactory outcome is due to concerns about the complexity related to alteration of existing Commonwealth agencies' funding agreements and contracts, including their reporting requirements, the Commonwealth needs to propose an alternative mechanism to achieve that goal prior to the Bill being tabled. One option may be to make use of powers vested in the Minister for Finance and Deregulation to direct Commonwealth agencies to amend aspects of their own procurement and tendering requirements and the administration of funding agreements which govern Commonwealth grants programs.

Outstanding legislative matters

The EM released with the ACNC Bill and the Transitional Bill highlights the reviews into the regulation and taxation of the NFP Sector in Australia and the consultations undertaken by Government on the establishment of an NFP Regulator. As a contributor to these reviews and a participant in the consultations, the ACBC acknowledges the improvements contained in the ACNC Bill arising from the consultations.

The ACBC cannot however provide unqualified support for the Bills in their present form because they fail to present the full picture and therefore do not enable regulated and responsible entities to assess the full impact if the Bills are enacted in the form of the Exposure Drafts.

The following essential elements for a full analysis and understanding of the impact of the Bills on regulated and responsible entities are missing:

- Regulations establishing the governance and external conduct standards or at a minimum clear guidelines and statements of principle that would highlight how these standards might impact the sector;
- Requirements for annual financial reports;
- Regulations to support the ACNC Bill;
- Consequential provisions;
- A statutory definition of charity.

While some of these have been foreshadowed for enactment at a later time, the ACBC is unable to provide unqualified support for establishment of a new regulator when its full suite of powers and the responsibilities of those who are to be regulated by it, are not yet known.

In the absence of the consequential provisions, the ACBC is not able to assess the extent and impact of the overlapping regulatory powers held by the ACNC with existing regulators, such as the Australian Securities and Investments Commission.

The ACNC Bill reflects the current common law test which we submit should be preserved in any future developments in the definition of charity.

Enforcement powers

The ACBC notes there are detailed enforcement powers set out in Chapter 4 of the ACNC Bill, which we understand are to be used only in extreme circumstances. The role of the ACNC Commissioner is to provide a program of education for NFPs so that there is no need to use these powers.

The lengthy list of powers proposed in the ACNC Bill focuses on matters which appear more appropriate for a criminal investigation authority rather than a body which is intended to promote and educate.

Recommendations

The ACBC recommends the enforcement powers held by the ACNC should not be greater than those held by the Australian Taxation Office (ATO) and should be focused on and limited to the issues raised in the ACNC Bill.

It would be appropriate for the introductory lines for Division 70 of the ACNC Bill to include a reference to the pyramid of enforcement (Treasury's Not-for-profit reform factsheet: The ACNC exposure draft – Education, compliance and enforcement. 9 December 2011) where "active enforcement" is the last step. The ACNC would first concentrate on investigation and support, then investigation, monitoring and compliance before moving to active enforcement only where absolutely necessary.

Public trust and confidence

The preamble to the ACNC Bill states the new regulatory system is to "maintain, protect and enhance public trust and confidence in the not-for-profit sector." The ACBC does not agree that the way to protect public trust and confidence is through a regulator. There should instead be a clear delineation of responsibilities where NFP organisations are responsible for ensuring they are worthy of public trust and confidence, while the regulator is responsible for ensuring that NFP entities receiving a tax concession are properly managed and there is proper and proportionate accountability.

The ACBC is concerned the ACNC Bill gives the Commissioner the power to deregister an NFP organisation if it 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." (S.35-10(2)(e)) The phrase "public trust and confidence" is not defined, which creates a high level of uncertainty and the possibility that the meaning of the phrase would need to be decided through expensive litigation.

Recommendation

The ACBC recommends there should be an amendment to the ACNC Bill to clearly define "public trust and confidence" so that there is legislative clarity for the Commissioner and the entities regulated by the ACNC.

SPECIFIC ISSUES

The ACBC would now like to direct attention to some specific issues in the ACNC Bill.

Governance and External Conduct Standards

The Governance and external conduct standards should be the subject of separate legislation at an appropriate time and not by regulation. At the very least, to avoid ambiguity, the ACNC Bill should include clear and specific statements of principle to establish criteria for the new governance and external conduct standards. The ACBC reserves the right to see and comment on the legislation that will support the Standards before the ACNC Bill is introduced into the Parliament. These Standards need to be flexible and adaptable to different types of entities and reflect the overriding objective not to discourage worthy persons who give of their time and expertise to assist those responsible for governing the entity.

In relation to the External Conduct Standards, clarity is required as to the meaning in Section 50-5(1) of the terms “legitimate beneficiaries”, “legitimate purposes “ and “other criminal activities”.

Basic Religious Charities (BRCs)

The ACBC appreciates the recognition given to the special role that entities established for the promotion of religion play in the community and the consideration given to attempting to remove unnecessary and burdensome requirements from these entities.

From this policy perspective, it appears that proposed section 205-35 is intended to establish a set of definitional requirements that replicate the usual activities of religious entities.

In the Catholic Church, many of these entities are our parishes – there are 1368 parishes in Australia. A parish is typically involved in worship, education (generally through a parish school) and community services and support, for example childcare for working families, family support, parent groups and the making available of parish facilities to parish and other community groups. To assist the Parish Priest in carrying out these roles, the parish community would typically support these activities both financially and by parishioners contributing their time, labour and expertise in a voluntary capacity. In some cases minor grants may be received by parishes from government for instance, to assist with refurbishment of Church buildings or to undertake some other local community work.

Whilst acknowledging and appreciating the policy intention behind the concept of a BRC, the ACBC notes that the term “basic religious charities” may give rise to negative overtones and comparisons and for this reason asks for the term to be replaced with a term such as “Religious Charities” or “Charities for the advancement of religion.”

The ACBC is pleased to note the effect of section 205-5(4) that a Church entity that may qualify as a BRC under section 205-35 will not have that status affected where it uses the

same trustee as another Church entity that may not qualify as a BRC. The capacity of a person / entity to act in several capacities, and the acknowledgement that on each occasion it will be taken to be a different entity, is an important and welcome inclusion that will support the way in which the Church operates.

Recommendations

Having reviewed the proposed section 205-35 the ACBC submits that changes are needed so that the definitional requirements contained in that section may more completely reflect the reality of life in a typical parish or church agency:

- **(DGR disqualifier)** In supporting the parish school, a large number of parishes have established School Building Funds which may or may not be under the ABN of the parish and have been endorsed as DGRs. Proposed section 205-35(3) excludes an entity from being a BRC if “it is a [DGR]”. ACBC notes that DGR is defined in section 30-227 of the Income Tax Assessment Act 1997 to include entities that operate a DGR fund. The current drafting would mean that the apparently well-intentioned exemption in the Bill will not apply in practice because section 205-35(3) would disentitle such a parish from being a BRC simply because it operated a School Building Fund.

We understand the rationale around monitoring and control of DGRs but we note that DGRs with annual revenue less than \$250,000 are not subject to reporting requirements.

As the only reason why such a parish would lose entitlement to be considered a BRC is that it is a DGR, we submit that this entitlement should not be lost where the DGR’s annual revenue is less than the threshold for medium registered entities. Our submission is that proposed section 205-35(3) reads:

*An entity is not a **basic religious charity** if it is a DGR, but only where the aggregate of the DGR activities of the entity alone would result in the entity being classed as a medium registered entity or a large registered entity.*

- **(Type and subtype)** The ACNC may consider that a typical parish conducting a school building fund (which is but one example of the extensive parish life) would also be entitled to registration as a subtype in column 2 of item 2 of the table in section 25-5(5) (Entity with a purpose that is the advancement of education). Although the Church would view the advancement of religion as the defining characteristic of the parish (even in relation to the school building fund activities), the risk of a different interpretation by the ACNC needs to be clarified so that an entity can still qualify as a BRC if it undertakes purposes within other subtypes provided that the advancement of religion is one of its purposes. For this purpose, we submit that proposed section 205-35(1) be amended as follows:

*Remove “: and” at the end of section 205-35(1)(b) and replace it with “.”
Remove section 205-35(1)(c).*

- **(Incorporated entities)** The ACBC does not understand why the methods of incorporation referred to in proposed section 205-35(2) should disentitle entities with a purpose that is the advancement of religion from being BRCs. In our view, it is the purpose and activities of an entity that should establish its entitlement to BRC status not its method of incorporation. We submit section 205-35(2) should be deleted.
- **(Government grant)** The ACBC does not consider entities should be precluded from BRC status where the entity receives minimal funding.

Parishes and other religious organisations sometimes receive small grants to assist with refurbishment of buildings or undertake local community activities. One example is the Community Building Partnership 2011 program of the State of New South Wales which was established to assist in building or improving community infrastructure. Such small grants should not preclude parishes from qualifying as BRCs and we submit that the legislation include a threshold of \$250,000 per annum which is less than the reporting threshold for medium registered entities before an entity is disqualified from BRC status.

Catholic Schools

In relation to education, the National Catholic Education Commission (NCEC) has highlighted that Catholic and other non-government schools will face additional financial and other compliance reporting which will add to and complicate rather than simplify their accountability processes. As religious schools will not qualify as “Basic Religious Charities”, they will still be required to comply with the following reporting and accountability obligations in addition to those which will apply under the ACNC Bill:

- State Education Acts relating to maintaining not for profit status;
- State based school registration, accreditation, compliance and reporting requirements;
- Commonwealth Department of Education, Employment and Workplace Relations annual Financial Questionnaire;
- Australian Curriculum, Assessment and Reporting Authority MySchool data collection and reporting.

All groupings of systemic schools, independent Catholic secondary schools and many primary schools will be classified as “large charities” and therefore be subject to the highest level ACNC financial reporting and accountability requirements.

The outcome for schools is an unreasonable compliance burden linked to demands to respond to differing compliance requirements, definitions, regulatory and funding obligations. This despite Catholic schools already being subject to a high level of formal public accountability and through the provision of regular, detailed financial reporting to Commonwealth and State agencies.

There is also the potential for inconsistency in application or conflict where schools are required to meet both ACNC and other Commonwealth and State statutory requirements. For instance, what would be the impact on State “fit and proper person” tests for registration of non-government schools if the ACNC made adverse findings or issued warnings or directions or even removed the head of a school or school system?

In addition, where schools that are charities are required to provide an enormous range of school financial information for publication by the ACNC, this could lead to the creation of distorted “league tables” when State schools do not have a similar level of reporting requirements.

The NCEC has also questioned whether a highly regulated sector like schools needs more regulation. If the education sector is to fall within the jurisdiction of the ACNC, given its current regulatory burden, it is submitted that this should be deferred (by way of express amendment to the ACNC Bill exempting registered non-government schools) until consolidated reporting - “report once use often” - has been achieved and can be implemented in respect of schools which are recognised as charities.

In addition, the principle of competitive neutrality established under National Competition Policy would appear to be violated should government schools that raise funds for their own purposes not fall within ACNC jurisdiction. The principle of competitive neutrality will also suffer in health, aged care, childcare and welfare where charities in the NFP sector are required to adhere to a far more extensive range of regulatory scrutiny than their counterparts in the public sector and also be subject to public reporting of their financial and other information when these requirements are not imposed on comparable government service providers.

ACN Register

The Commissioner is required to maintain an Australian Charities and Not-for-profits (ACN) Register (section 40-5). The ACBC is concerned that the Commission should not be required to publish every warning or direction, but should instead only publish injunctions or undertakings.

In addition, the extent of information required to be disclosed is unnecessary and burdensome (in terms of costs and resources).

Information gathering powers

There needs to be an express acknowledgement in the ACNC Bill that the information gathering powers will be subject to legal professional privilege, as currently applies in respect of the equivalent powers of the ATO in the tax legislation.

Additional Reporting Requirements

The ACBC would like an assurance that the additional reporting requirements in section 60-75 of the ACNC Bill will not mean we have to provide financial reports in circumstances where we would otherwise not have to do that.

Substituted Accounting Periods

While welcoming the opportunity for entities to advise alternative accounting periods to the financial year within six months of the commencement of the ACNC, the ACBC submits that entities which have already had a substituted financial year approved by another Commonwealth or State regulator, should not be required to notify the ACNC.

Accrual Accounting

It would appear that the financial reporting requirements may involve a move from cash to accrual accounting for responsible entities and it is far from clear for entities who currently operate on a cash accounting basis that the impact of more comprehensive accounting has been factored into the analysis in the Regulatory Impact Statement contained in the EM.

Responsible entities

Instead of “responsible persons” the ACNC Bill refers to “responsible entities”. The “responsible entity” of a company is its director (see section 205-30). “Company” is defined as including unincorporated associations (see 205-10) and the “director” of an unincorporated association is defined as “a member of the committee of management of the company or an individual who performs the duties of such a member”.

Except where an entity is a “basic religious charity” (see EM, page 124, 9.195), the Commissioner may remove “responsible entities” in certain circumstances and can appoint a temporary responsible entity (page 123, 9.189 and following) to positions such as the office holders in some church entities which are involved in education, welfare, health and aged care.

Regulatory Impact Statement

While the ACBC was thankful to see a RIS contained within the EM, we were disappointed at the lack of detailed analysis of costs and benefits of the Bill in its current form. We note here some deficiencies that we believe if addressed would raise confidence that the Government has taken into account all relevant considerations in coming to its decision to establish the ACNC in its proposed form:

1. The analysis in the RIS refers more to the NFP sector rather than charities – it is unclear whether the analysis took into account sufficiently the issues confronting charities;

2. The text in relation to involvement of State and Territory Governments does not instil confidence that meaningful negotiations have taken place to plan the promised reduction in red tape.
3. There is no reference in the RIS to the obvious costs involved with many issues raised by charities in their submissions to the various consultation processes.
4. A lack of any attempt to quantify all the benefits and costs of the proposal both in the short and long terms.
5. The considerable costs of transition of charities regardless of size – namely the potential legal costs for many charities in altering their governing rules to be compliant with the ACNC legislation, a process that may have to be repeated when the detail of governance and external conduct standards become known.

Conclusion

The EM (paragraph 17.5) sets out the regulatory issues clearly:

“The NFP sector’s regulatory framework is not meeting the needs of the NFP sector, Australian governments and the Australian public more broadly. The regulatory framework under which NFP entities operate is:

- fragmented and inconsistent;
- uncoordinated with regulatory responsibilities spread across a range of government agencies;
- producing complex reporting requirements which are, in certain situations, overlapping; and
- not adequately addressing the informational needs of the Australian public.”

Despite the huge effort invested in establishing the Australian Charities and Not-for-profits Commission by the Government and the sector itself, these issues are not solved by the ACNC Bill.

Yours faithfully

Rev Brian Lucas
General Secretary