



Submission to House of Representatives'  
Standing Committee on Economics

Inquiry into the Australian Charities  
and Not-for-profits Commission  
Exposure Draft Bills 2012

July 2012

## Introduction

ECH Inc., Eldercare Inc. and Resthaven Inc. are three of South Australia's largest and most experienced providers of residential and community aged care and housing options for older people. Our combined operations offer a comprehensive range of services and support to frail, older South Australians (and now Northern Territorians), including independent retirement living, Home and Community Care (HACC) services, community aged care packages, Transition Care, health and well-being services, respite and residential aged care. In all, we employ over 4,000 staff and provide assistance to many thousands of residents and clients each year. We thank the Committee for the opportunity to make a submission to this important inquiry.

## Objects of the Act

We support the government's proposal to establish a national regulator for the not-for-profit (NFP) sector as a statutory office, and the objects of enhanced public trust and a vibrant NFP sector. Of particular interest to us also is the principle of proportionate regulation and minimising procedural requirements and duplication.

In its report *Caring for Older Australians* (2011), the Productivity Commission acknowledged that the aged care sector suffers from 'complex, overlapping and costly regulations'. We cannot overemphasise the extent to which this adds difficulty to our mission of providing quality care and services to older people. For this reason, we believe the pursuit of a national regulatory framework is of utmost importance. In doing so, we believe the major objective should be the simplification and harmonisation of existing Commonwealth, State and Territory legislation, if not the eventual establishment of a single legal framework for the whole of Australia.

## Definitions

The Preamble and Objects of the Act refer to 'public trust and confidence' in the NFP Sector. Later, under Section 35-10 in relation to the possible revocation of an entity's registration, the Commissioner must take account of '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.'

The term 'public trust and confidence' is also used throughout the Explanatory Materials but no definition is offered and no guidance is provided as to how it might be gauged.

Similarly, Section 60-65, Errors in information statements and financial reports, refers to a 'material error' without providing a definition or guidance.

To avoid the potential for misinterpretation that might lead to consideration of de-registration or the application of an administrative penalty, we strongly recommend that both terms be defined in the Act, based on common law or some other authoritative source.

## **Options for regulation of the NFP sector**

We note that of five options canvassed in the Explanatory Materials, the preference is for Option 4, the establishment of an independent statutory office regulator called the Australian Charities and Not-for-profits Commission (ACNC). We agree that of the other options, the status quo is unacceptable and the establishment of an administrator within the Australian Taxation Office (ATO) has little to offer. As to the idea of the ACNC being established as an independent Financial Management and Accountability Act regulator (Option 5), we accept that the implementation and legislative risks are real and that Option 4 is likely to be equally effective.

We therefore support the establishment of the ACNC as a statutory office, but on the proviso that the Commission truly becomes a 'one-stop shop' for the sector through the added adoption of Option 2, the establishment of a national regulatory framework, as has been proposed by the Government.

## **The ANC Register**

We support the creation of a national internet Register of NFPs and a publicly accessible information portal. The ready availability of standardised information about NFPs in a consistent format should do much to maintain and enhance public trust and confidence in the sector.

We note that an entity may be entitled to registration as more than one subtype and that the subtypes now include a specific reference to aged care providers. We also note that entities need not provide details of the qualifications of responsible officers. Our understanding is that 'responsible entities' (as they are now referred to) would be defined as directors or trustees with no reference to particular qualifications. We support this change.

It is also pleasing to see that the Register will not only include details of any warnings issued to an entity but also any undertakings on the part of the entity and of the resolution of the matter. It is most important for public trust that an entity's actions to correct or avoid a breach or likely breach are made available on the Register and not just the warning.

A matter that remains outstanding is the possibility that a warning could be wrongly issued, in the sense that the Commission might be shown to have acted, albeit inadvertently, on incomplete or incorrect information. In such circumstances, we believe the Register should reflect the circumstances in the interests of maintaining public confidence.

## **Governance standards**

We support the establishment of a set of principle-based minimum governance standards through regulation but note that the standards are yet to be developed. We would appreciate having the opportunity to comment on the draft standards before they are finalised.

## Reporting

Section 60-5 requires entities to submit annual information statements but does not specify what information might be required. It might therefore be necessary that certain required information is classified as commercial-in-confidence so we believe the Bill should contain such a provision, together with offences in the event that the Commission discloses the information without the express permission of the entity concerned. Entities should also have recourse to compensation for any loss suffered as a result of the disclosure.

Large registered entities will also be required to provide audited annual financial reports that comply with regulations that are yet to be promulgated. It should be noted therefore that aged care providers are currently required to submit General Purpose Financial Statements each year to the Department of Health and Ageing (DoHA). Our understanding is that the report to the ACNC will replace the DoHA requirement and will not result in any additional information requirements (refer to comments in the following paragraphs). In this regard, the requirements of Division 60 of the Bill must not result in additional auditing costs.

We strongly support the 'report-once, use-often' approach, as proposed in the Explanatory Materials. According to Option 4, the recommended option, entities would only have to report to the ACNC and that the information so provided would then be used by other Commonwealth agencies for the purposes of tax concessions as well as government service delivery contracts. Moreover, the Implementation Taskforce would negotiate with State authorities to develop the proposed information portal as a 'one-stop shop' for reporting to State agencies. These would be very welcome initiatives indeed, particularly for large NFPs such as ourselves.

As an example, we each receive funding for our aged care services from DoHA and are subject to quite stringent requirements in relation to that funding. In addition to the annual General Purpose Financial Statements, there are a range of other reporting requirements associated with each grant and funding type (e.g. for residential care, community care and services, home care, respite services and day therapy programs).

The Explanatory Materials state that:

'Instead of interacting with numerous Government agencies on numerous occasions ... the NFP entity would only be required to report on one occasion to the NFP regulator.'

We therefore look forward to what should be very real improvements in the reporting requirements across government following registration with the Commission.

## **Additional reporting requirements**

The ACNC Commissioner will have the authority to require additional information in a financial report or an information statement that relates to a future period or a period up to six years before. We simply point out that information from six years prior might prove to be unreasonable in certain circumstances and that the Commissioner would therefore need to exercise some discretion in the matter.

## **Duty to Notify**

The requirement of Section 65-5 to notify the Commissioner of certain matters seem clear enough but we would appreciate confirmation that it excludes, for example, changes in circumstances under the *Aged Care Act 1997* relating to:

- Approved Provider status;
- Sanctions; and
- Complaints.

In accordance with the 'report-once, use often' approach, aged care providers should not have to report changes in Key Personnel and Board Members to both the ACNC and DoHA. As responsible entities such as Board Members will need to be reported to the ACNC given this Section covers changes in circumstances for the purposes of registration with the ACNC, other Key Personnel changes required by DoHA should fall under this provision as well, with DoHA able to extract this information under the 'charitable passport' for its purposes.

## **Information gathering and monitoring**

We draw the Committee's attention to the fact that aged care providers are already subject to rigorous accountability requirements in the form of prudential, building certification, accreditation and complaints regulations. We very much welcome the Government's objectives of reducing the reporting and compliance burden on NFPs but we are still unclear as to how, for example, the *Aged Care Act 1997* might interact with the Commission's information gathering, monitoring and enforcement powers.

In accordance with Division 70 of the Bill, the ACNC will be responsible for assessing whether an NFP's governance structures and financial position are appropriate. Similarly, DoHA requires an applicant in an Aged Care Approvals Round to provide certain information about the entity's financial position, management expertise and conduct. It is not clear whether the ACNC provisions will substitute for DoHA's application requirements.

We therefore recommend that the Act contain very clear provisions in terms of the interaction with other relevant legislation. The proposed 'charity passport' has the potential to avoid duplication and/or to minimise procedural requirements on the part of different government agencies and NFP agencies in the Aged Care sector, particularly if all the required information in this regard were included within the 'charity passport'.

Paragraph 8.13 of the Explanatory Materials states that the ACNC will not be responsible for product or service standards. In the case of aged care providers, rigorous accreditation and quality review systems already apply, including detailed site visits, so we therefore do not anticipate that the ACNC will even need to use its powers to enter the premises of and/or inspect aged care services. However, to ensure clarity and the minimisation of red tape in this regard, the distinction between the provisions relating to the ACNC and the Aged Care legislation needs to be made very clear.

### **Self-incrimination**

Section 70-25 of the Bill excuses an entity from self-incrimination except in the case of criminal proceedings outside the scope of the Bill. However, the common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person. The concept encompasses criminal matters as well as self-exposure to a civil or administrative penalty<sup>1</sup>.

We therefore recommend that the provision in the Bill be reviewed as it may be at odds with the common law privilege.

### **Education**

Section 110-10 (1) of the Draft Bill contains the provision that:

‘The Commissioner has the function of assisting registered entities in complying with and understanding this Act, by providing them with guidance and education.’

However, the educative function is embedded in the sections dealing with compliance and enforcement rather than being a broader role for the Commission. For example, there is a reference in the Explanatory Materials to ‘In cases where the ACNC’s educative function fails to induce required action ... the Commissioner ... will have the ability to use a range of enforcement powers.’

While we understand the need for enforcement powers, our concern is with the rather negative connotations of the associated educative function. We would therefore prefer to see an educative role established for its own sake and not just in association with compliance. An important example would be the encouragement of and guidance in best practice governance.

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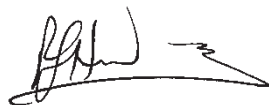
<sup>1</sup> [Australian Law Reform Commission](#)

## SUMMARY

There are many positive features to the Draft Bill but some important matters need further attention and it is the latter that we have focused on in this submission.

In summary:

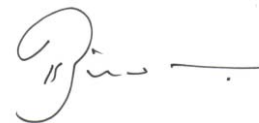
- we support the establishment of a national statutory office regulator for the NFP sector, together with the pursuit of a national regulatory framework;
- the longer term objective should be simplification and harmonisation of Commonwealth and State laws, leading eventually to a single national legal framework and regulator;
- the terms and concepts 'public trust and confidence' and 'material error' require definition in the legislation;
- The ANC Register should include details of any wrongly issued warning, following retraction of the warning, should the entity be able to show that the Commission acted on incomplete or incorrect information;
- the Bill should include provision for treating certain information as commercial-in-confidence and penalties should a breach occur;
- ACNC financial reporting requirements should replace those of other government agencies, including the Department of Health and Ageing;
- we strongly support the 'report-once, use-often' approach and encourage the Australian Government to pursue the same approach with the States and Territories as a matter of priority (refer also to second point above);
- requesting additional information dating from up to six years prior could prove problematic and the Commissioner will need to exercise some discretion;
- the Duty to Notify should not duplicate similar requirements of other government agencies. Alternatively, it should replace the requirements of the other government agencies with the information captured in the 'charity passport' concept;
- in relation to aged care providers, there is a need for clarity of the relationship between the ACNC's role to assess financial status and governance and that of the Department of Health and Ageing;
- we agree that the ACNC should not be responsible for assessing service standards covered under the Aged Care Act and Regulations;
- the self-incrimination provisions need to be reviewed in the context of common law privilege;
- the ACNC should have an education function for its own sake and not just in relation to compliance and enforcement; and
- we support the establishment of a set of principle-based minimum governance standards.



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