



**Supplementary Submission
to the
House of Representatives
Standing Committee on Economics**

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

26 July 2012

Introduction

This supplementary submission provides a brief outline of Mission Australia's additional response to the Exposure Draft Bills establishing the Australian Charities and Not-for-profit Commission (ACNC).

We have had further discussions with our Board, have been able to review the Draft Bills in more detail and received further advice. This submission is informed by those processes.

In support of our original submission provided to the Inquiry on 20 July 2012 and this supplementary submission, a senior Mission Australia representative would be pleased to appear before the House Committee. We have limited our comments to certain key aspects of the legislation that have direct relevance to Mission Australia's governance and operations.

Overview

Mission Australia is on record supporting the objectives of a robust and streamlined regulatory framework for the not-for-profit sector. The ACNC Bills provide for the establishment of an independent regulator for the charities and not-for-profit sector but it is not clear what reduction in regulation currently covering the sector is to take place.

Mission Australia remains concerned that the bills as drafted are more prescriptive in certain key areas than had been foreshadowed and do not reflect sufficient detail on the stated commitment to reducing unnecessary bureaucracy, red tape and duplication.

We are particularly concerned that the Directors' liabilities as set out in the draft Bills are inappropriate. They are not consistent with the responsibilities of directors and officers under the Corporations Act and pierce the corporate veil.

Reduction of red tape

One of the purported benefits of the legislation is reduction of red tape and the complexity of multiple reporting and regulatory requirements. The Regulatory Impact Statement notes that "there are currently more than 178 pieces of Commonwealth, State or Territory legislation that involve 19 separate agencies regularly determining the charitable purpose or status of an NFP entity¹". As a national organisation operating in all States and Territories, Mission Australia currently reports to, or is regulated by, nearly 30 regulators. A list is provided at Appendix One.

In any year we will provide hundreds of copies of our financial statements, our governance arrangements, our incorporation and copies of insurance certificates in tenders and in acquittals. There is a very real cost in providing this information and for the government departments who receive that information and must review it. We strongly support the removal of this duplication and our support for the ACNC has been largely predicated around reducing this compliance burden.

As the Regulatory Impact Statement notes, we said in our submission in 2011 "Mission Australia supports the referral of powers from the States to the Commonwealth to establish a national NFP

¹ Regulatory Impact Statement: Explanatory Materials ACNC Draft Bill p. 229 (2012)

regulator. It is acknowledged that without State support and further progress through COAG, a less than optimal national regime would result with ongoing duplication and inconsistencies in regulatory treatment across jurisdictions.”²

We support the notion of the ACNC as a one-stop regulatory stop and support the notion of a Charity Passport that will see us provide our financial and governance information once, to be used often. Yet it is disappointing to see no evidence of how this is being achieved.

Our overriding concern is that rather than reducing red tape and compliance burden, the ACNC will add another layer of compliance and that nothing will be taken away.

We expected to see the transitional arrangements that would provide assurance that co-operative agreements with States and Territories would be in place with concrete plans to transfer those powers and that a clear timetable should be laid out for that to happen. In fact, Section 185-5 would appear to enable State and Territory legislation to co-exist and the Regulatory Impact Statement suggests that these conversations are still to happen.

We do not know what the view of State and Territory governments will be and without their co-operation there may not even be a reduction in compliance costs.³ There is no supporting evidence of a negotiation with States and Territories, rather the explanatory materials are framed hopefully, for instance:

Through time it is possible that information in the charity passport could satisfy the requirements of State and Territory government agencies⁴

We also expected to see evidence of an agreement between the agencies such as ASIC, the Australian Taxation Office and other sector specific regulators including those foreshadowed such as the National Housing Regulator. However, with nothing evident we believe it would be appropriate to delay implementing parts of the legislation that require entities to provide financial and other compliance reporting to the ACNC until more details are available as to the Federal/State legislative interaction.

Given the importance of reduction of red tape, we recommend a reduction in regulatory burden be included in the objects of the Act.

The obligations of directors

Mission Australia’s previously expressed support for the ACNC was given on the proviso that the proposed structures, governance rules and reporting requirements for the ACNC are focussed on strengthening the sector. As a company limited by guarantee with robust governance structures we do not wish to see additional regulatory burdens other than those currently operating under Corporations Law.

² Regulatory Impact Statement: Explanatory Materials ACNC Draft Bill page 242

³ Regulatory Impact Statement: Explanatory Materials ACNC Draft Bill Page 248

⁴ Regulatory Impact Statement: Explanatory Materials ACNC Draft Bill Page 80

We are concerned that the liabilities for directors set out in Division 180 of the Exposure Bill are misconceived. We believe the provisions pierce the corporate veil and change the concept of limited liability.

The approach in the Corporations Act imposes duties on directors and officers personal behavioural duties which are owed to the company of which they are directors and officers. Primary responsibility for compliance with legislative obligations sits with the company as a separate legal entity. We agree with the Australian Institute of Company Directors on this issue and echo their concern that the requirements in the draft Bill “are more onerous than what apply to directors of our largest listed companies.”⁵

We also point out that directors of not-for-profit organisations provide their time and expertise pro-bono. In the case of Mission Australia, our Directors are called by a commitment to their Christian faith and the desire to contribute their professional expertise constructively to the governance of Mission Australia as a public benevolent institution seeking to meet the needs of those disadvantaged in our society. Whilst the voluntary nature of directorships does not absolve directors from their fiduciary responsibilities, onerous liabilities may encourage potential directors to reconsider whether or not they have the personal capacity to participate as Directors of not-for-profit organisations. Our current board acknowledge the requirements and responsibilities under the Corporations Act and have established our governance arrangements around that.

As a company limited by guarantee, Mission Australia is subject to the Corporations Act which imposes duties and liabilities on directors and there is significant case law to support the interpretation of these provisions. This Bill seeks to change the approach and there would be little case law to support how it may be interpreted. This concern is compounded by the fact that the standards to which entities need to comply have not yet been determined.

Governance standards

We are concerned that the process for developing the governance standards remains unclear. Whilst we understand the need to consult on the standards and we welcome the opportunity to participate in those consultative processes, it does place the not-for-profit sector in an invidious position.

To evaluate the head of power for those standards in the draft Bill, and the associated penalties for non-compliance, it would be helpful to have draft standards to consider for suitability and appropriateness.

As a company limited by guarantee, Mission Australia believes that the rules framework provided under the Corporations Act is appropriate as the minimum requirements for an NFP entity’s governing rules. We also consider that having robust governing rules should be required as part of the registration process with the ACNC, and these requirements could be complimented by guidance on good governance principles similar to those adopted by the Charity Commission of England and Wales.

⁵ Australian Institute of Company Directors’ Submission On the ACNC Bill 2012 page 3

We have previously made available our own governance arrangements and have reproduced these in Appendix Two. We strongly support good governance but do not support overly prescriptive approaches. The relationship between a not-for-profit organisation and its members is fundamental to an entity achieving its mission and objectives. It is in the best interests of a not-for-profit to communicate openly with its members. We consider existing good governance practice makes it unnecessary for the ACNC to mandate governance rules for members and our preference would be for a guidance approach based on existing principles.

Mission Australia supports a principles-based approach to governance for the not-for-profit sector proportionate to size and risk as canvassed in the Consultation Paper. We believe best practice governance principles focussing on an entity's mission and purpose are sufficient to ensure accountability to the range of stakeholders that not-for-profit directors and responsible individuals need to consider.

We welcome an approach that assists not-for-profits to adopt good governance principles, and would support the ACNC making available guidance materials on governing principles and best practice.

Investigation powers

The draft Bill includes a number of information gathering, monitoring and sanctioning powers in Chapter 4. We are of the view these are onerous and many would appear to be stronger than many other regulators.

As with our comments on directors' responsibilities, we would expect that the current provisions of the Corporations Act are sufficient and that the powers of the ACNC should be no greater than those granted to ASIC.

Background

Mission Australia is a community service organization that has been transforming the lives of Australians in need for more than 150 years. Today our 550 community and employment services help more than 300,000 Australians a year get back on their feet.

Conclusion

In conclusion, Mission Australia supports government regulation of the NFP sector that enables and strengthens not-for-profit organizations, reduces red tape and duplication, is proportionate, and builds public confidence in the sector.

However, the draft ACNC establishment bills require significant improvements to best support the interests of the NFP sector and broader Australian community.

Taking into account our comments above, we ask the committee to look specifically in detail at:

- The ability of the ACNC to reduce the compliance burden and the transitional arrangements in place with both Commonwealth agencies and State and Territory regulators;

- Deletion of part 7.4 given the duties of directors arising from existing case law and the Corporations Act;
- The governance standards and the process of developing them;
- A review of Chapter 4 in comparison with the Corporations Act.

Submitted by Mission Australia to the House Economics Committee on 26 July 2012 by email to economics.reps@aph.gov.au

Appendix One

List of regulatory agencies and legislation for Mission Australia and related entities

Commonwealth

- Australian Taxation Office
- Australian Securities and Investments Commission
- Health Department (Aged Care Standards and Accreditation Agency)
- Education and Care Services National Law Act & Regulations (childcare)

NSW

- Department of Education and Communities (Childcare)
- Registrar of Community Housing (Mission Australia Housing Ltd)
- Charitable Fundraising Act 1991 & Regulations 2008
- Lotteries & Art Unions Act 1901 & Regulations 2007

Queensland

- Department of Housing (Registration as a housing and accommodation provider)
- Collections Act 1966 & Regulations 2008
- Charitable and Non-Profit Gaming Act 1999 and Regulation 1999

Victoria

- Housing Registrar (Mission Australia Housing (Victoria) Ltd)
- Victorian Children's Services Act 1996 & Regulations 2009
- Fundraising Act 1998 & Regulations 2009
- Gambling Regulation Act 2003 and Regulations 2005

South Australia

- Education and Care Services National Regulations, Education and Early Childhood Services (Registration and Standards) Act 2011 & Regulations 2011
- Collections for Charitable Purposes Act 1939
- Lottery and Gaming Act 1936 & Regulations 2008

Tasmania

- Collections for Charities Act 2001
- Gaming Control Act 1993.

Western Australia

- Department of Housing, Office of the Registrar (Registration as a housing and accommodation provider)
- Street Collections (Regulation) Act 1940 (paramount over Charitable Collections Act) & Regulations 1999
- Charitable Collections Act 1946 & Regulations 1947

- Gaming and Wagering Commission Act 1987 & Regulations 1988

Northern Territory Australia

- Gaming Control Act
- Gaming Control (Community Gaming) Regulations

Australian Capital Territory

- Charitable Collections Act 2003 & Regulation 2003
- Unlawful Gambling Act 2009 and Regulation 2012
- Lotteries Act 1964

Appendix Two

Mission Australia is a not-for-profit public company limited by guarantee. The Mission Australia Board endorses the Corporate Governance Principles and Recommendations where appropriate, established by the Australian Stock Exchange (ASX) Corporate Governance Council. While Mission Australia has no obligation to adopt these principles, as a leading NFP we are committed to good governance principles and practice.

In 2011, Mission Australia's high standard of reporting and public accountability was recognised with a PwC Transparency Award, which recognises the quality and transparency of reporting in the not-for-profit sector.

Mission Australia's Board [Governance Charter](#) closely reflects the key governance guidance principles made available by the Charity Commission of England and Wales. The Charter sets out the role of the Board as providing "strategic guidance" for Mission Australia and "effective oversight of management". Under the Charter the Board is "the guardian of the founding purposes for which Mission Australia was established and is accountable to members for pursuit of that purpose and the performance of the Mission Australia Group". In this regard the emphasis is on a stewardship and oversight role for directors with "responsible individual's" including key management personnel in the organisation.

In response to the discussion points posed in the Government's consultation paper, the following section provides an overview of Mission Australia's governance principles under each point, and how these principles manifest in our organisation's day-to-day practice. We have commented on the specific questions the Consultation Paper poses but only where we have views.

6.1 Responsible Individual's Duties

The role of Mission Australia's Board is to provide strategic guidance for the organisation and its controlled entities (*Mission Australia Group*) and effective oversight of management. The Board is the guardian of the founding purpose for which Mission Australia was established and is accountable to members (see 6.5) for the pursuit of that purpose and the performance of the Mission Australian Group. Duties of individual directors include:

- *Decision making* – Directors should bring an independent judgment to bear on Board decisions and question, request information or raise any issue which is of concern to them so as to canvas fully all aspects of any issue confronting the Mission Australian Group. Directors cast their vote on any resolution according to their own judgement. Outside the Boardroom, Directors support the letter and spirit of Board decisions.
- *Director Independence* – All Directors of Mission Australia must be independent.
- *Confidentiality* – Directors keep confidential Board discussions, deliberations and decisions which are not publicly known.

- *Code of conduct* – Directors will comply with the Mission Australia Code of Conduct and are expected to act ethically at all times whilst undertaking their duties.

6.2 Disclosure Requirements and Managing Conflicts of Interests

Mission Australia is not subject to the ASX Listing Rule disclosure requirements but adopts these principles to report to members. Mission Australia has policies, vetting and authorisation processes designed to ensure that announcements:

- are made in a timely manner and are factual;
- do not omit material information whether positive or negative; and
- are expressed in a clear and objective manner.

Mission Australia promotes and supports ethical and responsible decision making. A Code of Conduct applies to the Board, Management and staff of Mission Australia. It specifies practices necessary to maintain confidence in Mission Australia's integrity, including taking into account legal obligations and reasonable expectations of stakeholders.

The Code outlines expectations for personal and professional behaviour, including how to manage receipt of gifts and benefits and how to resolve a conflict of interest. Conflicts of interest and conduct are specifically mentioned in the Board Corporate Governance Charter. A separate, more detailed Conflict of Interest Policy is also enforced.

Day to Day Practice

An Ethics Committee has been established to deal with strategic and specific ethical issues. Mission Australia has established a Whistleblower Policy. An internal ombudsman-type function independent of operation activity exists to receive, inquire and investigate reports of unethical practices and wrongdoing. Support and protection for speaking up about wrongdoing is available to staff, volunteers, contractors and clients. An Integrity Hotline has been established to receive allegations of possible wrongdoing.

6.3 Risk Management

The Board is responsible for oversight of material business risks and is assisted by the Board Audit and Risk Committee in this role.

The Committee has a formal Charter with responsibility to assist the Board to fulfil its corporate governance responsibilities particularly in relation to oversight of the:

- Maintenance of an effective framework of risk management, including compliance and internal controls;
- Reliability and integrity of the financial statements and external financial communication;

- Effectiveness of the external audit and internal audit functions;
- Adequacy of Mission Australia’s insurance coverage.

In addition to the work of the Board, management has established and implemented an enterprise-wide risk-management system that regularly assesses monitors and manages material operational, financial reporting and compliance risks.

Day to Day Management

Strategic Risk Registers for all Group entities are reviewed at least annually to address material business risks. Risk-treatment action plans are developed that align with executive annual strategic performance plans to ensure our activities are sustained and grow. Executive management reports to the Board and gives assurance there is a sound system of risk management and internal control and the system is operating effectively in all material respects in relation to financial reporting risks.

A risk-management policy and framework have been developed to embed risk management practices into existing management processes and procedures. Every person responsible for a financial project code is required to at least annually assess risk in the context of the project as part of an integrated, enterprise-wide risk management system. Annual attestations from those project managers are provided to support declarations by executive managers relating to the reasonableness of the internal control environment and risk-management processes. These executive declarations provide support for attestations by the Chief Executive Officer and the Chief Financial Officer to the Board prior to sign-off of the annual financial statements and report.

6.4 Minimum Requirements for an Entity’s Governing Rules

Mission Australia’s governing rules are set out in the organisation’s Constitution, the legal document incorporating the organisation. Mission Australia’s legal capacity and powers exist solely for the purposes of furthering the organisation’s Objects.

Other governing rules outlined in the Constitution include (amongst others):

- Membership;
- Liability and contributions of members;
- Distribution of property and winding up;
- Procedures for calling general meetings and proceedings;
- Powers and duties of Directors;
- Inspection of records.

6.5 Relationships with Members

As a company limited by guarantee, Mission Australia does not have shareholders but does have members. Our communication policy supports open, regular and timely information to members and stakeholders using electronic or other means.

Mission Australia has many stakeholders including our clients and their families, those we partner with in the provision of services, our donors and benefactors, staff and volunteers, the broader community, our suppliers and the government agencies who provide us with funds and regulate our operations. We adopt a consultative and transparent approach in dealing with all of our stakeholders.

Mission Australia's reports formally to members through the Annual Report and Annual General Meeting.