

Catholic Diocese of Bunbury (CDB)

**Submission on
ACNC Bill 2012
Exposure Draft**

20 July 2012

To:
The Secretary
House Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

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Background

The submission is made on behalf of the Catholic Diocese of Bunbury (CDB) and is provided in response to calls for public submissions into the House Standing Committee on Economics inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills.

The CDB represents a substantial portion of the community of the south west of Western Australia, south of a line from Mandurah in the north to Esperance in the east. There are approximately 53,700 Catholics in the CDB, with a total population of 287,000 (2006 Census). The Catholic population is 18.7% of the total. There are 26 parishes, in the pastoral care of 31 priests. There are some 41 priests in total, including religious priests, working within the CDB, including those on lesser duties and retired priests. Religious sisters and deacons also minister within the diocese to support the mission of the church.

In addition to the parish communities, other Catholic organisations in the diocese include:

- **Catholic Education Office & Schools:** which educate more than 9,000 students in 27 schools.
- **CatholicCare:** this is a trust which supports the charitable and pastoral activities of the CDB. It is a public fund which is endorsed as a DGR.
- **Catholic Development Fund:** this is an agency of the CDB which through pooling financial resources, furthers the mission of the church and supports the charitable and pastoral works of parishes, schools and agencies in the CDB.
- **Health, aged care and retirement villages:** These are health & aged care facilities in 4 parishes in the CDB.
- **Welfare:** the CDB also comprises various other religious and affiliated agencies supporting and providing direct aid to the needy in the community.

This submission addresses certain aspects of the ACNC Bill Exposure Draft, particularly the legislation's inability to address the real problems raised by the NFP sector, but also other aspects. It is intended to supplement and reinforce the submission from the Australian Catholic Bishops' Conference and sector-specific submissions of Catholic Health Australia and Catholic Social Services Australia. The CDB believes it is important that the inquiry hears the views of a small regionally based diocese and the impact of this proposed legislation.

Summary

The ACNC Bill 2012 purports to address the need, identified by the NFP sector over a long period of time, to simplify current multi jurisdictional registration and reporting processes. It is important to note that this need for simplification pertains particularly to NFPs with a national footprint and is not relevant to the vast majority of NFP organisations. The ACNC Bill follows on from previous attempts to legislate in the NFP sector that have previously been rejected by the sector and the parliament. The ACNC Bill as it stands, seeks to include a majority of organisations within its scope that previously had no involvement with the hand of government in their day to day operations.

Reference is made to the 2010 Productivity Commission NFP Report where it states *“diversity of the sector suggests that such sector-wide treatment is unlikely to be appropriate as different segments warrant regulation and concessional treatment (p4)”*. The proposed Bill does not reflect this view.

The factsheet accompanying the ACNC Bill published by Treasury (July 2012) acknowledges the intended theme of simplification yet the ACNC Bill does nothing to achieve this aim. The Bill will instead:

- Impose increased compliance costs through the continued maintenance of multi jurisdictional regulatory bodies, for which there is no current consensus or agreement to abolish;
- Impose increased compliance costs through the imposition of new reporting requirements and new statutory records maintenance (eg: registers of responsible entities);
- Expose the sector to new administrative and criminal sanctions for contraventions of new and additional obligations imposed under the Act;
- Expose individuals, whether acting as paid employees or as volunteers, to joint and several liability for breaches of the Act;
- Increase the reputational risk of the sector through adverse publicity arising from information published on the NFP Register.

The CDB again wishes to draw attention to the Productivity Commission’s own findings where they emphasised the Government should ensure appropriate independence for organisations in the NFP sector and “not impose conditions associated with the general operation of the funded organisation beyond those essential to ensure the delivery of the agreed funding outcomes” (recommendation 11.3). Clearly, the proposed ACNC Bill goes much further than the Productivity Commission has previously recommended.

The CDB believes that the scope of the NFP reforms should be limited to simplifying registration and reporting processes for large NFPs. The CDB argues that all other issues are already satisfactorily dealt with through existing legislation and acquittal requirements.

Specific Issues Relating to the ACNC Bill

The CDB believes that the ACNC Bill fails to address the real issues facing the NFP sector and oversteps the mandate in the following areas:

1. Constitutional Basis for the Bill

The explanatory memorandum goes to some length to explain the constitutional basis for the ACNC Bill. In our view, the EM fails to consider Section 116 of the Constitution which states:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, **or for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (emphasis added)*

As far as the ACNC Bill pertains to religious organisations, it clearly contains provisions that purport to permit the government through the Commissioner, to determine and affect the governance structures (Div 85), organisational leadership (Div 100) and day to day administration of religious entities (Sub Div 85-B, Div 90). The CDB believes these provisions may contravene the constitutional prohibition on free exercise of religion. Religious organisations are made subject to government control – a clear breach of the separation of church and state principal. According to the Constitution, religious organisations should be free to arrange their affairs as they best see fit in order to carry out their temporal and spiritual works. The ACNC Bill appears to fail to account for this right.

2. Preamble: Framing the NFP Environment

Funding sources for the NFP sector as acknowledged are inadequate and incomplete. The major funding sources for the majority of NFPs would be via monies raised from members and fundraising activities (whether through investments, commercial activities and/or other member/volunteer based activities).

The identification of public donations, grants and other support from Australian Governments as the source of funding NFPs deliberately seeks to frame the environment for NFPs into that of a compliance based regime. These funding sources either do not apply to a majority of NFPs or if they do, would be of minimal significance to most NFP's overall income sources.

Furthermore, it is difficult to understand how the absence of a taxation expense constitutes funding by the Government. Charitable entities apply their resources for the purposes for which they are established and any resources diminished by taxation, directly affects the level of services provided. The absence of taxation merely allows the Charitable sector to apply the maximum sum possible towards their purpose. It does not mean that they are effectively given more funding by the government to undertake their works. In fact one would argue that the government recognises that the NFP sector is more efficient in delivering these services to the extent that outsourcing of services to the NFP sector occurs. It is disingenuous to suggest that the sector is provided with a benefit through the absence of taxation when it is often the

government itself that gains a financial benefit through the provision of services by the NFP sector and thus is relieved of meeting societal needs itself.

Attempts to frame the NFP sector into a generic compliance regime environment ignores two fundamental aspects of NFPs that apply to the majority of organisations in the sector:

- i. NFP entities are a collection of members;
- ii. NFP entities are not an investment option.

For the vast majority of NFP entities, there is no fiduciary relationship with the general public that needs to be protected through a regime based on other legislation such as Corporations Law and Taxation Administration Act as seems to be the case with the ACNC Bill.

3. Objects

The stated objects do not go toward addressing the problems identified by the NFP sector. “Maintaining, protecting and enhancing public trust and confidence” is a solution to a problem that has not been identified.

The degree of government intervention and influence does not support a vibrant, independent and innovative sector. The Bill will deter volunteers from participating in managing NFP organisations due to the administrative penalties applicable and reputational risk from information placed on a public register.

4. The Pre-Emptive Hand of Government

The ACNC Bill contains a recurring theme whereby the regulator has the power to act or make a decision in situations where a registered entity “is likely to contravene” or “is likely to not comply” with provisions of the ACNC Bill provisions. . See for example:

- S35-10(1)(c)(i & ii) &
35-10(2)(a) Revoking registration
- S80-5 Warnings
- S85-5 Commissioner’s power to give directions
- S100-5 Suspension & removal of responsible entities

These provisions remind one of the film “Minority Report” where “offenders” are arrested (or worse) before a crime is committed. Such pre-emptive powers might be appropriate in pursuit of persons actively plotting crimes against individuals or the community but it is at least questionable whether the powers are appropriate for potential breaches of an administrative Act.

5. Indeterminable & Novel Provisions

Public Trust & Confidence

The purported objective of preserving the public trust and confidence in the NFP sector is not determinable (eg: S 35-10(2)(e)). Which part of the public is examined for their trust and

confidence in the sector? Who determines the public's level of trust and confidence and how is it measured? There is great potential for selective and ideological views to be given prominence over the interests of the NFP's own members and stakeholders.

Public Interest

The notion of "public interest" is not determinable in our opinion along similar lines to those mentioned above. Who or what part of the public is referred to? Who determines what their interest in the matter is? Does the "public interest" override individual rights and protections such as seems to be the case in S 40-10(2). Here the Commissioner is given the power to publish information on the register if it is determined that the "public interest" overrides considerations such as:

- The information being published is inaccurate, likely to cause confusion or mislead (s40-10(1)(b))
- The information is likely to offend (s40-10(1)(c))
- The information could endanger public safety (s40-10(1)(d))

The notion of "public interest" is again one likely to be subject to selective and ideological views and therefore represents a significant risk to the operation of NFP organisations.

Not-for-Profit "Nature" (S65-5(3)(b))

In terms of ascertaining whether a contravention of the Act is significant, the legislation introduces the new term "nature", which as far as the CDB is aware has not previously formed part of the criteria for determining charitable status. The CDB argues that the sole determinant of charitable status is whether the entity is pursuing a charitable purpose. It is not clear why a new condition has been included in the considerations.

6. Onerous Regulatory Obligations

There are numerous examples of heavy handed regulation that appear to have been taken directly from other commonwealth legislation and which are applicable to significantly more sophisticated and better resourced entities. Particular examples of new maintenance & compliance tasks include:

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| S40-5(c) | Register of responsible entities; |
| S40-5(f) | Detailed descriptions of warnings, directions, undertakings, suspensions, removals of responsible entities; |
| S65-5 | Duty to notify - change of name, address, responsible entity, governing rules. |

The fact that a significant penalty regime is attached for breaches of these provisions exposes many NFP entities to additional liabilities. It is difficult to see how volunteer based organisations are being supported, assisted and educated in improving their standard of operations through such measures. Instead, it is more likely that services of volunteers and board members will be more difficult to procure given the potential exposure. If education is the key object, one

wonders for example, how publication of the matters in S.40-5(f) will encourage a willingness to engage in the sector.

7. New Penalty Regime

The ACNC Bill opens up significant new liabilities for NFP Entities and their responsible entities (ie: volunteers and staff). It is counter intuitive to introduce such a regime where the object is to encourage a vibrant and innovative sector made up of staff and volunteers who receive significantly less recompense (if any) than others in the commercial environment subject to similar obligations.

Examples of new penalty provisions include:

- Strict liabilities & offences S.55-5(6&7), S.70-5(4),
- Administrative Penalties Div 175
- Obligations, liabilities & offences Div 180

Further, general accepted common law protections such as the right to remain silent have been waived via provisions requiring information subject to monitoring to be given under oath S.70-5(3) & S.75-40(4). The apparent relief under S.75-40(5) is deliberately undermined by S.75-40(6) & S.75-40(3).

8. Basic Religious Charity Exemption

The concession in the form of a Basic Religious Charity (BRC) is tokenism at best. The conditions attached to achieving this status covered by S.205-35 mean that minimal religious organisation entities are eligible for relief from specific provisions of the Act. Even in the case of a very basic parish based entity, receipt of minor government agency funding such as a heritage building grant or local government community grant is enough to qualify for three years of regulation under the ACNC Bill. There is no certainty as to BRC status and hence compliance obligations under the proposed recognition criteria.

Religious organisations are eligible for registration under multiple sub-types in S.25-5(5). It is inexplicable why the ACNC Bill seeks to restrict the scope of religious practise to one aspect only of the Church's mission and thus deny recognition as a BRC (S.205-35(1)(c)).

Even where BRC status is achieved, the ACNC Bill does not exempt such entities from the majority of the oppressive and unreasonable government interventions into the affairs of the organisation. The BRC exemption, in as much as it purports to offer relief, is still deficient in addressing the constitutional requirement to avoid restricting the free expression of religion - under all aspects of S. 25-5(5)!

Conclusion

The proposed ACNC Bill presents significant problems for the CDB in terms of:

- its ability to freely express religious beliefs and values;
- placing significant administrative and compliance burdens on the CDB;
- exposing the CDB and responsible entities to new liabilities and risks for no apparent benefit to the church itself.

For the wider NFP sector, the degree of regulation is completely out of step with the original problems identified by the sector itself and the Productivity Commission. The ACNC Bill will discourage participation and suppress the level of services offered through the diminution of financial and human resources available to serve the needs of members and the wider community. The effect of this legislation on the level of volunteer support for the NFP sector, should not be underestimated.

The solution is to gain consensus first among state and federal regulatory bodies for mutual recognition of NFP entities. Extensive regulation is not needed as existing measures such as standard business reporting, AML/CTF legislation, DGR audit requirements and ATO audit activities etc will cover the concerns that the ACNC Bill is apparently attempting to address over the actual needs of the sector.