

Additional Comments by the Australian Greens

Introduction

1.1 This package of Bills provides a framework for reform in the Not-for-profit sector, by introducing an Australian Charities and Not for Profit Commission (ACNC) with powers to both register and regulate charities for the purpose of ensuring that they use their assets and income effectively and efficiently as well as powers to reduce the burden of regulatory compliance.

1.2 Following an inquiry by the Joint Committee into the Government amendments to the package of Bills, the Australian Greens support the recommendations in the majority committee report, however there are still some other key elements that need to be addressed before these Bills are passed and therefore make these additional comments to that report.

1.3 There has been limited time to adequately review this legislation and the Australian Greens are likely to make further comments in the Senate Community Affairs Reference Committee inquiry that has run parallel to the Joint Standing Committee Inquiry.

Reducing Red-tape

1.4 One of the significant opportunities present by establishing an ACNC is the possibility of reducing the regulatory burdens on our not-for-profit sector by providing a mechanism by which charities can use reporting to the ACNC to satisfy other reporting obligations.

1.5 Not-for-profit organisations currently have to report across a number of Commonwealth Departments and comply with State legislation; depending on the size of the organisation and how many jurisdictions it operates across, the reporting and compliance burden can present a significant administrative cost to the organisation.

1.6 As it presently stands, this Bill sets the framework for greater harmonisation and the 'report once, use often' charities passport but also introduces a new level of compliance for many not for profit entities by including a new requirement to report to the ACNC without having yet removing other obligations.

1.7 While Section 130-5(2) refers to the annual reporting obligations of the ACNC, which reflect current practice for Government agencies to provide detailed reports of their annual expenditure and achievements, and the Government has amended the Bill to provide a five year review of the ACNC's performance, it is the view of the Australian Greens that the ACNC should also be required to report its progress against an established timeline for harmonisation both across federal departments and with states.

Recommendation 1.1

1.8 That the ACNC develop a timeline for reducing red-tape and that the ACNC provide a yearly report to the Parliament that details its work towards reducing the regulatory burden on not-for-profit entities

Governance Standards and External Conduct Standards

1.9 45-10(1) specifies that that the Governance Standards, which registered entities must abide by in order to maintain their registration, shall be determined by regulation.

1.10 50-10(1) specifies that that the External Conduct Standards, which registered entities must abide by in order to maintain their registration, shall be determined by regulation.

1.11 The Australian Greens believe that these standards should be contained within legislation rather than devolved to regulations.

1.12 In recognition of the significant work to be undertaken to establish the Governance and External Conduct Standards, it would be appropriate to develop and bring forth a separate schedule with these details after the ACNC has been established and has had an opportunity to undertake further consultative work.

1.13 This is reflective of the position of ACOSS who submitted that the Bill should include a requirement to conduct a certain amount of negotiations in good faith with the sector with the aim of producing a mutually agreed set of governance standards.

1.14 The Australian Greens also support the ACOSS recommendation that the Bill should require these governance standards to preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfill its functions.

1.15 ACOSS propose the following be inserted at provision 45-10, along the following lines:

(6) However, the governance standards must deal only with the minimum standards required to meet the objects of the Act and must:

(a) be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation;

(b) be in proportion to the size of the organisation and the level of financial, organisational and reputational risk;

(c) preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfill its functions;

(d) not prevent or constrain not-for-profit organisations from carrying out advocacy functions in pursuit of their purpose; and

(e) where possible, not duplicate any regulatory requirement already in place.

Recommendation 1.2

1.16 That consultation with the not-for-profit sector is a condition of establishing and subsequently changing the Governance and External Conduct Standards.

Recommendation 1.3

1.17 That the ACNC establish in the Bill a requirement to consult in good faith with the not-for-profit sector about the Governance and External Conduct Standards.

Recommendation 1.4

1.18 That these standards become a schedule of the legislation rather than as regulations.

Recommendation 1.5

1.19 That the current Bill insert an additional section after 45-10 (5) that reflects the suggestions made by ACOSS for this section.

Recommendation 1.6

1.20 More-likely-than-not as a factor in triggering the Commissioner's powers

Revoking registration

1.21 The Commissioner has the power to revoke registration under section 35-10(1)c, which can be triggered by a belief that a not-for-profit is more-likely-than-not to contravene the governance or external conduct standards.

1.22 There is also a statement of factors to which the Commissioner must have regard when revoking registration, including the provision at 35-10(2)e which requires the Commissioner to have regard to the extent to which the registered entity is conducting its affairs in a way which may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector.

1.23 Similarly, Section 15-10 of the ACNC Bill outlines matters that the commissioner must have regard to when exercising their powers and functions, which includes 'the maintenance, protection and enhancement of public trust and confidence in the not for profit sector.'

1.24 The Australian Greens are concerned that these provisions give the Commissioner too much power to take pre-emptive enforcement action when an organisation has not as yet breached the conduct standards, and to look beyond

specific breaches of legal liability and responsibility toward subjective judgments about how the not-for-profit sector should operate.

Other Enforcement Powers

1.25 The Commissioner also has the power to issuing warnings, directions or undertakings as per 40-5(1)f, which can also be triggered by a belief that a not-for-profit is more-likely-than-not to contravene the governance or external conduct standards.

1.26 The more-likely-than-not terminology provides the Commissioner with excessive powers and should be removed, particular if other concerns regarding the establishment of governance and external conduct standards are not resolved.

Recommendation 1.7

1.27 Remove the more-likely-than-not terminology and the have regard to public trust and confidence section from the Bill.

Publishing enforcement actions online

1.28 The Commissioner must publish online all warning notices and directions and undertakings, as well as suspensions of registration. The published notices remain on the website for 5 years and have the potential to result in serious reputational damage for the organisations they were issued against, particularly if the more-likely-than-not triggers for enforcement action remain in the legislation.

1.29 While the more-like-than-not provisions remain in place, the Australian Greens consider this to be a power that has the potential to undermine rather than build public trust in the not-for-profit sector.

Tax Bill

Definition of Not-For-Profit

1.30 The Australian Greens are concerned with the definition of not-for-profit that is set forth in this Bill.

1.31 The Australian Greens have particular concern with the wording in Schedule 1, Provision 3, Section 44, which refers to not-for-profits 'not being carried on for the profit of gain of its members'. Evidence submitted to the committee suggests that this can potentially undermine the capacity of organisations, such as disability service organisations, to recruit members who benefit from the services of the organisation to the organisation's board.

1.32 The Majority Committee report also acknowledges the difficulty of this wording, and recommends that the tax office issue additional advice regarding the interpretation. The Australian Greens are concerned that the definitions are

insufficient and should be amended within the text of the Bill as well as being supported by additional treasury advice.

1.33 The Australian Greens acknowledge that additional work is being undertaken to review and reform the statutory definition of a charity, and recommend that the elements of this Bill that can be deferred until that legislation is completed should be deferred and then reviewed in light of that legislation.

Recommendation 1.8

1.34 Defer the elements of this Bill that can be deferred until the complimentary Charities definition legislation is completed in order to review the not-for-profit definition in light of that legislation.

In Australia Provisions

1.35 The Australian Greens retain some concerns about the application of the In-Australia provisions. These concerns include, but are not limited to, the application of these rules to touring arts organisations and the responsibilities of a registered entity to ensure that monies distributed to another entity are not subsequently sent overseas.

1.36 The majority Committee report also acknowledges some of these difficulties and recommends that the tax office issue additional advice regarding the interpretation of these provisions. The Australian Greens are concerned these issues should be resolved within the text of the Bill as well as being supported by additional treasury advice.

Recommendation 1.9

1.37 Resolve and clarify the in-Australia provisions within the text of the Bill

Senator Rachel Siewert

