

Dissenting Report by Labor Senators

Background

1.1 During the 17 years prior to the establishment of the ACNC, there had been 'six separate reviews of the charitable and NFP sector. They included: the comprehensive 2001 report of the inquiry into the definition of charities and related organisations; the 2009 review into Australia's future tax system; and the Productivity Commission's 2010 report, *Contribution of the not-for-profit sector*. The Productivity Commission identified clearly 'an urgent need to bring together the multiplicity of governance, taxation and fundraising regulatory arrangements, especially at the Commonwealth level'. The Commission stated:

While reducing compliance costs is one motivation, improvements in the regulatory regime are important for maintaining trust in the fidelity and integrity of the NFP sector.

1.2 The Commission proposed the establishment of a national 'one-stop-shop' for Commonwealth regulation in the form of a Registrar for Community and Charitable Purpose Organisations to improve and consolidate regulatory oversight and enhance accountability to the public.¹ During his second reading speech introducing the ACNC Act, the Minister referred to the numerous reviews on the NFP sector, noting that they:

...recommended simplifying and harmonising taxation and regulation for the sector, with a national regulator and a statutory definition of charity.²

1.3 It cannot be disputed that the ACNC regulatory regime was a well-researched and thoroughly considered reform with wide community and NFP sector support. Indeed, Mr Robert Fitzgerald described the consultation period leading up to the ACNC Act as:

...the most exhaustive period of policy development, inquiry and consultation ever undertaken in relation to a policy affecting the not for profit sector.³

1.4 Making a similar observation, Ms Susan Pascoe, Commissioner, ACNC, informed the committee that the ACNC was 'born from nearly two decades of advocacy, formal inquiries and formal consultative processes'.⁴

1 Productivity Commission, *Contribution of the Not-for-Profit Sector*, Productivity Commission Research Report, January 2010, p. xxxvi, http://www.pc.gov.au/data/assets/pdf_file/0003/94548/not-for-profit-report.pdf (accessed 12 June 2014).

2 Mr David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, *House of Representatives Hansard*, 23 August 2012, p. 9722.

3 *Submission 52*, p. 5.

The establishment of the ACNC

1.5 The ACNC Act established a new regulatory framework for the sector and created the ACNC as the Commonwealth level regulator responsible for administering the legislation. The reasons for having a new regulatory system for the NFP sector were direct and clear. The intention was to:

- establish a robust and streamlined regulatory framework for the NFP sector, including a 'report-once, use-often' reporting framework— the ACNC would create a 'one-stop shop' for ACNC registration, tax concessions, and accessing Australian Government services and concessions;
- strengthen the sector's transparency, governance and accountability; and
- provide the public with information on the sector commensurate to the level of support provided to the sector by the public.

1.6 According to the 2012 Explanatory Memorandum:

The move to the 'report-once, use-often' approach would reduce the compliance burden associated with duplicative, ad hoc and inconsistent reporting.⁵

The bill to repeal the ACNC

1.7 To appreciate fully the need for, and work of, the ACNC, an understanding of the regime that existed before its establishment is necessary. In this regard, the Community Council for Australia described the convoluted and time-consuming process that charities were required to follow even for a simple task:

...to hire a local hall at a discounted charitable rate, gain a concession on local rates charges, achieve a reduction in payroll tax, put forward a submission for funding, participate in a government tender process, register a fundraising activity or seek to claim a concession of any kind, the organisation must be able to produce some kind of bona fides, a kind of organisational passport. No such document existed—there was no public national register of charities. Charities were forced to provide copies of letters from the Australian Taxation Office that define their eligibility for taxation concessions as proof of their charitable status. The situation was difficult at best.

When you consider the range of regulatory bodies, different levels of government, different government departments all imposing their own form of regulatory requirements on the sector, the cost of inappropriate regulation becomes apparent.⁶

4 *Proof Committee Hansard*, 23 May 2014, p. 65.

5 Explanatory Memorandum , Australian Charities and Not-for-profits Commission Bill 2012 and Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012, p. 4.

6 *Submission 89*, p. 3.

1.8 In its view, there was overwhelming evidence that the previous system for regulating charities 'did not work in the interests of the government, the community and charities themselves.'⁷ Furthermore, since its establishment, support for the ACNC has remained strong. According to the Commissioner:

Support for the ACNC or a national charity regulator is consistently at around 80 per cent, as evidenced from an analysis of the submissions to this inquiry and three independent surveys conducted by Grant Thornton, Pro Bono Australia and Our Community.⁸

1.9 ACOSS also referred to the strong support for the ACNC, citing the recent survey showing that 80 per cent of the sector supported the ACNC:⁹

It is unusual for an industry to be championing regulation. However, as the recipient of ineffective regulation for many years, the Australian NFP sector recognises the value of an effective, sector-centred, streamlined and proportionate regulatory regime. In particular, the sector recognises the positive role that regulation can play in supporting the work of the sector. This includes:

- maintaining public trust in the work of the sector;
- working with the sector to raise the standard around governance, accountability and transparency; and
- working to introduce meaningful reporting of the sector and reduce duplication of reporting.¹⁰

1.10 Many submitters drew attention to the fact that ACNC had only been in operation since the end of 2012. For example, ACOSS recognised that:

...it is still in the early stages of development. As such, many of the objectives of the ACNC, particularly in relation to reducing 'red tape' and duplication have not yet been fully achieved. However, work that has commenced in a number of jurisdictions, particularly in South Australia and the ACT, has shown progress towards these aims, and has given the sector an indication of the usefulness of the ACNC in supporting a streamlining of reporting, and a reduction of 'red tape'.¹¹

1.11 The ACNC also noted the significant progress that had already been made in only 16 months, including setting up Australia's first free, online, national register of charities, a 'report-once use-often' framework to reduce red tape, and a specialist sector-tailored approach. It explained further that if allowed to be fully implemented, the ACNC model:

7 *Submission 89*, p. 3.

8 *Proof Committee Hansard*, 23 May 2014, p. 65.

9 *Submission 112*, p. 11.

10 *Submission 112*, p. 5.

11 *Submission 112*, p. 5.

...has the potential for very significant longer term benefits (such as simplifying and streamlining fundraising requirements and reducing duplicative reporting across agencies and jurisdictions). Such opportunities will be lost if the ACNC model is not given time for full implementation.¹²

1.12 The Community Council for Australia listed some of the achievements so far, which include:

- over 3000 new charities have been registered with the ACNC—feedback collected by the ACNC and other organisations indicates that these new charities found the process of becoming a registered charity through the ACNC to be a positive process;
- over 60,000 charities are now listed on a publicly available register—for the first time, Australians can look up a charity and there have already been over 400,000 visits to this register;
- the extent of information provided by this register is growing as charities complete their Annual Information Statements (AIS)—already 83 per cent of eligible charities have completed their AIS, 25,000 charities have lodged their governing documents with 22,000 already published on the register;
- 686 complaints received which resulted in over 250 investigations—most of these investigations have been resolved through various forms of mediation and working with the charities themselves;
- over 1.3 million visits to the ACNC website, more than 45,572 telephone calls answered with an average wait time of 33 seconds, and 55,000 mail items have been received;
- 216,214 visits to ACNC guidance (including factsheets, guides and FAQs);
- a 'one stop shop' for charities to register, report, and access Commonwealth Government taxation and other concessions—the ACNC and the ATO have developed a seamless registration process across both agencies;
- a Memoranda of Agreement with seven government agencies/regulators;
- close to finalising the Charity Passport to facilitate a 'report once, use often' framework so that charities no longer need to report multiple times to different government agencies (this passport will be supported by Commonwealth Grant Guidelines) and other regulatory and funding agencies.¹³

1.13 In the view of the Council, ACNC has made remarkable progress in a short period of time. It stated the it would be difficult:

12 *Submission 95*, p. iv.

13 *Submission 89*, pp 6–7.

...to find any comparable regulator that has been able to achieve so much in its establishment phase, especially when you consider the political pressure applied on the ACNC since its inception.¹⁴

1.14 According to the Council, the ACNC was 'not an instant quick fix, but a long term structural change that will become increasingly important over time'.¹⁵ The signatories to an open letter to the Prime Minister reinforced this view:

In little over one year of operation, the ACNC has built a strong positive reputation by establishing the first public national register of charities, registering more than 2,600 new charities, responding to over 70,000 requests for information from charities and the broader community, investigating and resolving over 200 complaints against charities, and monitoring the extent of red tape and level of public trust and confidence in our charities. The ACNC has done what few new regulators achieve—gained widespread support across the sector it is regulating.¹⁶

1.15 The Queensland Law society observed that the Regulatory Impact Statement fails to acknowledge the progress made in setting up the framework.

Remove duplication

1.16 As highlighted in the majority report, a number of groups within the NFP sector have found difficulties with the new regime. Ms Pascoe accepted that some of the concerns raised, including those expressed by Catholic Health Australia and by the Association of Australian Medical Research Institutes (MRIs), were understandable. The Commissioner assured the committee, however, that:

...the intention would be to adopt similar practice to that agreed with the education sector; in other words...for very well-regulated sectors to find a means of either linking to existing databases or extracting from those databases and putting on the ACNC website.¹⁷

It should be noted that I have advised relevant state and territory ministers and local charities that the ACNC will accept their financial reports prepared for jurisdictional regulators until 2015, to avoid duplication—so in a similar vein.

14 *Submission 89*, p. 9.

15 *Submission 89*, p. 1.

16 Open Letter to Government: Retain Charity Regulator—18 March 2014, Professor Ann O'Connell, NFP Project, Melbourne Law School, University of Melbourne; Belinda Drew, Chief Executive Officer, Foresters Community Finance; Brett Williamson, Chief Executive Officer, Volunteering Australia; Dr Caroline Lambert, Executive Director, YWCA Australia; Dr Cassandra Goldie, Chief Executive Officer, Australian Council of Social Services; Carrie Fowlie, Executive Officer, Alcohol Tobacco and Other Drug Association ACT; Carrillo Gantner AO, Chairman, Sydney Myer Fund and 51 other parties.

17 *Proof Committee Hansard*, 23 May 2014, p. 66.

1.17 ACOSS also noted that existence of a minority voice outlining opposition to the ACNC on the basis of duplication of regulatory effort, over reporting and costs of compliance. It shared the view of ACNC that:

These are issues that, with goodwill and effort can be overcome, and in many cases relate to reluctance of regulatory bodies other than the ACNC to explore efficiency and streamlining.¹⁸

1.18 The Labor members note the willingness of the ACNC to work closely with highly regulated bodies such as Catholic Health, Universities and the MRIs to minimise duplication and to remove any complications arising from interaction between the Corporations Act and the ACNC Act. The Labor members believe that through their continued cooperation ACNC could develop mechanisms that would remove the need for duplication in administrative tasks and reporting, which would significantly reduce cost and time.

Lack of consultation

1.19 Many submitters complained about the lack of consultation regarding the proposed repeal of the ACNC Act.¹⁹ The approach to consultation stands in stark contrast to the comprehensive discussions and reviews that took place before the ACNC was established. Mr Robert Fitzgerald made an observation consistent with many others who opposed the bill: He stated:

The process has lacked any open or formal consultation processes. There have been no independent reviews or inquiries, no issues or discussion papers, no call for submissions, no exposure drafts.²⁰

1.20 The Queensland Law Society was particularly concerned with the Explanatory Memorandum and the Regulatory Impact Statement 'being less than rigorous, and not meeting the usually high standards and disciplines of Commonwealth legislative processes'.²¹

Counterproductive

1.21 In essence, the evidence from the great majority of submissions indicated that the abolition of the ACNC would be counterproductive. A number of submitters noted that the repeal of the ACNC act contradicts the government's own stated intentions. In Mr Fitzgerald's opinion, the abolition of the ACNC would:

...not ultimately reduce red tape as it removes the very means by which unnecessary red tape can be eliminated or reduced across the

18 *Submission 112*, p. 11.

19 See, for example, *Submission 113*.

20 *Submission 52*, p. 9.

21 *Submission 7*, p. 2.

Commonwealth and other jurisdictions; and eliminates important information sharing arrangements.²²

1.22 The signatories to an open letter to the Prime Minister reinforced the message that removing the ACNC was a retrograde step:

The Australian Government intends to shut down the ACNC as soon as it can, and in the meantime, cut its funding and capacity. It is planning to return the key role of determining charitable status to the Australian Taxation Office, re-creating a conflict of interest. This approach is, at best, an unfortunate policy for charities across Australia and our community. Red tape will continue to grow, the size of the bureaucracy will grow, and services to the sector and the public will be reduced.²³

1.23 Furthermore, the ACNC pointed out that 'a return of regulatory functions back to ATO and ASIC would mean a return to the same regulatory deficiencies, the loss of a specialist regulator and unnecessary transitional costs for charities'. It would also mean a significant loss of public transparency and accountability.²⁴

Conclusion

1.24 The Labor members found the evidence in favour of retaining the ACNC compelling—not only because of the sheer numbers of charities and other organisations that strongly supported the work of the ACNC but because of the soundness of their arguments.

1.25 In its very short life, the ACNC has already registered impressive achievements, maintained strong support for its work and has shown itself flexible and accommodating through the transition period. It has been especially willing to develop mechanisms to assist highly regulated organisations to minimise their administrative burden.

Recommendation 1

1.26 The Labor Senators recommend that the bill not proceed.

22 *Submission 52*, p. 10.

23 Open Letter to Government: Retain Charity Regulator—18 March 2014, <http://www.communitycouncil.com.au/node/165>

24 *Submission 95*, p. iv.

Recommendation 2

1.27 The Labor Senators recommend further that the ACNC and the bodies that are already highly regulated continue their efforts to establish ways to avoid duplication of effort and to remove 'red tape'.

**Senator Mark Bishop
Deputy Chair**

**Senator Louise Pratt
Senator for Western Australia**