

Senate Standing Committees on Economics
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Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee

Re: Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

Not-for-profit Law (**NFP Law**) (previously PilchConnect) is a program of Justice Connect (previously the Public Interest Law Clearing House or PILCH). NFP Law provides free and low cost legal assistance to not-for-profit community organisations in Victoria and New South Wales. Many of the groups we assist are small, completely volunteer-based charities. Further details about NFP Law are available at the end of this submission.

We welcome the opportunity to comment on the *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (ACNC Repeal Bill No. 1)*. We have been actively engaged in discussions as to the role of an independent regulator for the not-for-profit and charitable sector, and are grateful for the opportunity to comment on this latest proposal.

We will comment briefly on **four** topics:

1. the issues arising out of the proposed two-stage legislative process to repeal the *Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act)*
2. the lack of impact analysis in the Regulatory Impact Statement (**RIS**) accompanying the ACNC Repeal Bill No. 1
3. the consultation process generally, and
4. the impact and cost of abolishing the Australian Charities and Not-for-profits Commission (**ACNC**)

1. The two-stage legislative process

The two-stage legislative approach to abolishing the ACNC is problematic – the ACNC Repeal Bill No. 1 abolishes the ACNC without providing Parliament, or the charity sector, essential details of the replacement arrangements the Government intends to put in place.

The Government is proposing a two-stage repeal of the ACNC. The RIS and the Explanatory Memorandum (**EM**) accompanying the ACNC Repeal Bill No. 1 make several references to a second, substantive Bill, the *Australian Charities and Not-for-profits Commission (Repeal) (No. 2) Bill 2014 (ACNC Repeal Bill No. 2)*. The ACNC Repeal Bill No. 2 has not been introduced into Parliament or released publicly or, as far as the sector is aware, even drafted. The Government has not released details on its policy on charity regulation or the proposed ‘replacement arrangements’¹ for the ACNC, other than brief references to a ‘National Centre for Excellence’.²

According to the RIS, the abolition of the ACNC has been split into a two-stage process so that the Government can affirm its intention to repeal the ACNC whilst also allowing it time to determine what will replace the ACNC.³ Further, Repeal Bill No. 1 will not take effect until Repeal Bill No. 2 has received Royal Assent. This process is inherently flawed, given informed debate on

¹ Regulatory Impact Statement, page 4

² Explanatory Memorandum, page 2

³ Regulatory Impact Statement, page 5

the ACNC Repeal Bill No 1 is not possible if details of the successor agency or agencies are not provided and there are no details as to the interim arrangements. Also, it leaves the sector in a state of uncertainty whilst the details of the ACNC Repeal Bill No. 2 are worked out.

At the very least, we recommend consideration of the ACNC Repeal Bill No. 1 be deferred until the Government has had the opportunity to draft and release its policy for the future of charity regulation in Australia.

2. The lack of impact analysis

We have concerns about the lack of impact analysis in the RIS. Given the ACNC Repeal Bill No 1 contemplates returning the sector to a regulatory environment the Productivity Commission found to be costly, complex and lacking coherence, it is vital that Parliament has robust information about the impacts of the reforms in order to make a proper assessment of its merits.

The ACNC was established as a response to the comprehensive Productivity Commission report, *Contribution of the not-for-profit sector* (2010). The Productivity Commission looked at barriers to the productivity of the sector and identified the prior (2010) regulatory environment for charities and not-for-profits as “complex, lacks coherence, sufficient transparency, and is costly to NFPs”.⁴

Consequently, the Productivity Commission recommended the establishment of a national, independent, tailored regulator for the not-for-profit sector.⁵ The Commission recommended that the regulator determine charitable status for federal law purposes and be responsible for the charity register, among other duties.

The establishment of the ACNC was based not only on the Productivity’s Commission’s recommendation but also 15 years worth of reports calling for an independent, tailored regulator for the sector.⁶ The ACNC took over functions previously performed by the ATO and ASIC, as well as new functions, such as the publication of a detailed, searchable charities register.

The Government’s interim *Regulation Impact Statement Process Guidance Note* (January 2014) states that:

“The purpose of a Regulation Impact Statement (RIS) is to give decision-makers a balanced assessment based on all the best available cost and benefit information and to inform stakeholders and the community about the likely impact of the proposal... It is important to note these arrangements apply equally to all changes, whether a proposal is regulatory or deregulatory.”

The RIS states that “existing regulators can provide a similar level of oversight at a lesser cost, both in terms of administrative costs to Government and in terms of costs imposed on regulated entities...” If the Government intends to return the sector to a regulatory regime that has been analysed as costly, complex, lacking coherence and a barrier to the contribution of the not-for-profit sector, then it ought to provide Parliament and the public with details of the impact of this policy on the sector.

Alternatively, if the Government intends to move some of the functions of the ACNC to a new National Centre for Excellence,⁷ then the cost and impact of these reforms should be explained so Parliament can make an informed decision.

Finally, we would recommend that a comprehensive impact analysis be conducted on the option of amending the ACNC Act to remedy any perceived deficiencies in the regulatory framework. We see scope for the ACNC to retain at least some of its current regulatory functions (within an amended legislative framework), notably to continue to determine federal charitable status and maintain a register of charitable organisations. The regulator could also be a central point for sector reform (for example, could regulate national fundraising in the future).

3. The consultation process

The lack of public consultation in relation to the ACNC Repeal Bill No. 1 has been disappointing. We recommend deferral of consideration of the Bill until the Government has an opportunity to undertake full consultation in accordance with the *Australian Government Guide to Regulation* (2014).

In January 2014, charities and interested parties wrote to the Minister for Social Services and the Department of Social Services (DSS) seeking to be involved in consultations about the future of the ACNC. They received a written response that the DSS would be conducting public consultations about the ACNC in late January and February 2014. In a meeting attended by

⁴ Page xxiii, Productivity Commission, *Contribution of the not-for-profit sector*, 2010.

⁵ Recommendation 5, Productivity Commission, *Contribution of the not-for-profit sector*, 2010.

⁶ Starting with the 1995 Industry Commission [Review into Charitable Organisations in Australia](#), the 2001 [Inquiry into the Definition of Charities and Related Organisations](#), the 2009 [Senate Inquiry into Disclosure Regimes for Charities and Not-for-Profit Organisations](#) to the most recent Productivity Commission report on the [Contribution of the Not-for-profit sector](#) in 2010.

⁷ Regulatory Impact Statement, page 3.

NFP Law in late February 2014, representatives of DSS advised that the Government had decided not to proceed with public consultations with the sector. They advised that the Minister was going to undertake targeted consultations only.

The Government's own, recently released *Australian Government Guide to Regulation*⁸⁾ sets out that:

- **full public consultation** should be the default form of consultation to encourage “openness and trust in a decision making process” and
- **targeted consultation** should only be used when “your stakeholder group is in a small geographic area or other well defined category”.⁹

As charities are located Australia-wide and are not a small or homogenous stakeholder group, the consultation process for the ACNC Repeal Bill No. 1 falls well short of the Government's own, recently published guidelines.

The canvassing of ‘views’ referred to in the RIS also lacks rigour. The RIS ignores the comprehensive and detailed body of work on the issue of an independent charity regulator in Australia, including:

- detailed academic research undertaken on these issues by Melbourne University Law School's Not-for-Profit Law Project¹⁰ and Queensland University of Technology's Centre for Philanthropy and Non-profit Studies¹¹
- hundreds of submissions by community organisation's to numerous government inquiries and consultations about the regulation of the charity sector and the proposal for an independent regulator, including
 - **108 submissions** to Treasury's Consultation on the ACNC Bill:
www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/Australian-Charities-and-Not-for-profits-Commission-Bill/Submissions
 - **319 submissions** to the Productivity Commission's Contribution of the Not-for-profit Sector Study – many of which addressed the issue of a charities regulator, available at:
www.pc.gov.au/projects/study/not-for-profit/submissions
 - **77 submissions** to the House of Representatives Standing Committee on Economics' inquiry into the Revised Exposure Draft of the ACNC Bill and accompanying Exposure Draft of the ACNC Consequential and Transitional Bill available at:
www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/nonprofit/subs.htm
 - **49 submissions** to the Senate Community Affairs Legislation Committee's inquiry into the ACNC Bill 2012 and its accompanying Consequential and Transitional Bill available at :
www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/charitiescommission/submissions
 - **47 submissions** to the Joint Committee on Corporations and Financial Services' Inquiry into the ACNC Bill 2012 and its accompanying Consequential and Transitional Bill available at:
www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/charities/submissions
- the Productivity Commission's final, comprehensive report, *Contribution of the NFP Sector*, available at www.pc.gov.au/projects/study/not-for-profit/report (see particularly recommendations 6.5).
- 15 years of reports that have reviewed and analysed the regulatory environment for charities in Australia.¹²

Many not-for-profit organisations spent time and resources writing submissions to these inquiries because they wanted their views heard by Government and to influence the debate about a need for a charities regulator in Australia. In our view it is disrespectful to the sector that this body of evidence and analysis on charity regulation is being overlooked in a 5 page RIS that is intended to provide Parliament with a balanced assessment based on all available information.

⁸ www.cuttingredtape.org.au

⁹ Australian Government, *Australian Government Guide to Consultation*, page 41, www.cuttingredtape.org.au

¹⁰ University of Melbourne Law School's Not-for-profit Law Project, *Defining, Taxing and regulating not-for-profits in the 21st Century*, 2008 – 2014, www.law.unimelb.edu.au/tax/research/current-research-projects/defining-taxing-and-regulating-not-for-profits-in-the-21st-century/publications

¹¹ Queensland University of Technology's Centre for Philanthropy and Non-profit Studies, *Publications and Resources*,

www.qut.edu.au/business/about/research-centres/australian-centre-for-philanthropy-and-nonprofit-studies/publications-and-resources

¹² Refer to footnote 6.

A public consultation on a documented policy about the Government's intentions for the future regulation of charities would allow Parliament, and the public, to properly assess the merits or impact of the Government's alternate charity regulation policy.

4. The impact and cost of abolishing the ACNC

There are real costs that Parliament should consider in the context of making a decision to abolish Australia's first independent regulator for charities.

The following costs of abolishing the ACNC ought to be considered in relation to the ACNC Repeal Bill No.1, particularly given the lack of clarity regarding the Government's policy on the future of regulation of charities in Australia.

Transparency

The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) establishes Australia's charity register. This is a publicly-available charity register, setting out a level of simple, mandatory information about charities in Australia. An example of an entry on the ACNC charity register is available here: www.acnc.gov.au/RN52B75Q?ID=6E1FDA07-BC08-42B6-996B-826739EA65A6&noleft=1

The register sets out information about an organisation's purpose, charity status, taxation status, basic operations and financial position. This information can be used by the public, funders and governments, to help them determine which organisations to support with their time or money. A publically available register is just as useful for charities themselves - to quickly prove their legal status, to promote their work and to avoid having to report or update the same information, often, to different government agencies, funders or donors.

To be effective, a publically available register needs a regulator to oversee charity records and to check the accuracy of reporting. The regulator only needs limited powers to enforce reporting compliance, but it does need the legal authority to act in the case of non-compliance to protect public trust and confidence in the sector. A 'sector-controlled body' would not have this power, unless it is at least quasi-regulatory.

If the current legislative powers that the ACNC has are considered to be too onerous, amendments can be made to the ACNC Act. However, this can be done without dismantling the register, which is a low cost, effective regulatory mechanism, and the ACNC, which acts as a light-touch regulator with an emphasis on education and capacity building to ensure the ongoing integrity and accuracy of the register.

It is noted that since it commenced operation, the ACNC has had:

- 1.3 million visits to the website
- 407,359 visits to the ACNC Register
- 216,214 visits to ACNC guidance (including factsheets, guides and FAQs)
- average visit to the website is 6 minutes and people visit approximately 5 pages per visit
- 56,000 visits to the Charity Portal since December 2013 (used by charities to update their information)
- visitors to the Charity Portal spending approximately 15 minutes per visit¹³

A responsive regulator

The tenor of feedback our lawyers receive from community organisations we work with is that they find ACNC staff to be helpful and responsive to their queries. While some may be disappointed that their application for charity status was unsuccessful, they have been able to concede that the process was clear, the response was timely and the decision was communicated to them in a manner they could understand. In this regard we endorse the Queensland Law Society's submission to this inquiry,¹⁴ in which they have provided a comparative analysis of the work and timeliness of the ACNC in responding to the needs of this important sector, as opposed to the previous regulatory regime.

For a sector that contributes \$43 billion to Australia's GDP, and over 8 per cent of employment,¹⁵ having a dedicated regulator is a proportionate and smart response. Many of the community organisations we support have commended the ACNC as a

¹³ Australian Charities and Not-for-profits Commission, *ACNC Key Facts and FAQs*, 2014, www.acnc.gov.au/ACNC/Edu/ACNC_key_facts_and_FAQs.aspx

¹⁴ Queensland Law Society, Submission 7, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ACNC/Submissions.

¹⁵ Productivity Commission, *Contribution of the NFP Sector*, 2010, www.pc.gov.au/projects/study/not-for-profit/report.

body focussed on and understanding of the needs of the not-for-profit sector (something that the ATO, ASIC and even state incorporated association registrars are not able to do given the vast amount of other functions given to those regulators). For the small not-for-profit organisations we work with, having people that they can speak to who understand their legal structure, the fact that they do not operate like a business and do not have shareholders or in-house accounting teams, is invaluable.

The sentiments of our clients are echoed in surveys conducted by a number of organisations which have found strong sector support for the ACNC. A Grant Thornton survey, *Doing good and doing it well?*, undertaken in 2013, revealed that 83 % of not-for-profit organisations believe the sector needs a national regulator.¹⁶ In Pro Bono Australia's *Not for Profit Sector Election Survey* undertaken in 2013, respondents reported a strong preference for the ACNC to be the national regulator when compared to the ATO.¹⁷

Since its establishment, the ACNC has produced an impressive range of detailed, tailored guidance for charities. In our experience these publications have been extremely helpful, particularly for small, unrepresented groups with limited resources to understand the transitional arrangements and new regulatory functions. The education and guidance functions of the ACNC have been critical to its positive 'uptake' by the sector, and its outputs to date show its capacity to genuinely support and promote good governance and improve compliance in the charitable sector in Australia.

The ACNC is also well positioned to provide ongoing guidance to the sector about the new statutory definition of charity in Australia. The *Charities Act 2013* (Cth) commenced on 1 January 2014 and now provides a single, consistent definition of charity for all federal laws. As experience has shown in other jurisdictions overseas, the combination of a statutory definition of charity plus a regulator that can provide ongoing guidance to the sector about the elements and obligations of being a charity will assist small community organisations to set up and thrive.

The RIS asserts that some of the purposes for which the ACNC was established have not eventuated.¹⁸ This appears to be narrow view given that only 15 months have passed since the establishment of the Commission. The ACNC needs time to reach its full potential as the tailored, national, independent regulator that the Productivity Commission envisaged. Shutting it down or reducing its functions after only 15 months operation will be a lost opportunity.

Reversion to an untenable regulatory environment

The RIS acknowledges that charities will continue to be regulated in Australia even if the ACNC is abolished.

It is intended that the regulatory functions previously transferred to the ACNC from the ATO and ASIC will return to those bodies. In place of the ACNC, broad support for the sector will be provided by a new National Centre for Excellence.¹⁹

NFP Law strongly opposes a reversion to the regulatory framework that existed before the establishment of the ACNC, which the Productivity Commission found to be complex, lacking coherence and costly for NFPs.

As the Productivity Commission (amongst many others) identified, the ATO historically became the 'de facto' regulator for the sector, because of the lack of an independent national body to determine charitable status. The ATO's primary role is to administer tax laws to protect the national revenue base. We submit there is a fundamental tension between this role, and the ACNC's role in determining charitable status that enlivens tax concessions that reduce the national revenue. It is inappropriate for the ATO to be the decision-maker of charitable status given its inherent responsibilities to protect revenue. We note that the ATO has acknowledged in its submission to the 2001 Charity Definition Inquiry, that 'administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether organisations are charitable or non-profit, or not'.²⁰

ASIC's main role is the regulation of the business sector, whose objectives and aims are very different from those of not-for-profit community organisations.

We submit that:

¹⁶ Grant Thornton, *Doing good and doing it well?*, 2013, http://www.grantthornton.com.au/Industry-specialisation/not_for_profit.asp.

¹⁷ Pro Bono Australia, *Not For Profit Sector Election Survey*, 2013, <http://www.probonoaustralia.com.au/news/2013/08/red-tape-compliance-key-nfp-issues-sector-survey-results>.

¹⁸ Regulatory Impact Statement, page 3.

¹⁹ Regulatory Impact Statement, page 3.

²⁰ Australian Tax Office, Submission to the Inquiry into Charities and Related Organisations, 2001, available at http://cdi.gov.au/html/public_submissions.htm

- The ATO and ASIC are institutionally entrenched in regulating in the 'for-profit' context. Their overarching philosophies, objectives and approaches are incompatible with the effective regulation of the voluntary sector.
- Both the ATO and ASIC are focused on enforcement and have been known to rigorously investigate and prosecute contraventions. The charitable sector requires a different regulatory approach in view of their mission-driven nature. The ACNC's regulatory approach is designed specifically to meet the sector's needs for practical assistance to comply with regulatory obligations, using enforcement powers only as necessary in serious cases (such as fraud).

Key to the ACNC's current role is the determination of charitable status and maintenance of a register of charitable organisations. In our view, these aspects of the current regulatory framework are philosophically fundamental to the effective regulation of charities, and can and should (at least) be retained in some legislative reform.

If found necessary, the regulatory, investigative and enforcement powers given to the current regulator could be reviewed, as could the reporting regime (i.e. to ensure alignment with incorporated reporting). However we submit the cost and inconvenience to charities who have taken steps to comply with the new regime over the last 15 months to change again should also be carefully considered.

We thank the Committee for the opportunity to respond to the ACNC Repeal Bill No. 1 and would be happy to elaborate on any of the issues raised in this submission upon request.

Yours sincerely



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About Justice Connect

Justice Connect is a not-for-profit community organisation and a charity. We deliver access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them.

Justice Connect was formed when PILCH NSW (established in 1992) and PILCH Vic (established in 1994) merged on 1 July 2013. We work with thousands of lawyers, including 50 NSW and Victoria law firms and hundreds of barristers. We are financially supported by our members, federal and state government and philanthropic support, fee for services and donations.

Justice Connect's CEO Fiona McLeay is Deputy Chair of the ACNC Advisory Board.

About NFP Law

NFP Law 'helps the helpers' by providing tailored legal information, advice and training to not-for-profit community organisations. By relieving the burden of legal issues, organisations can better focus their time and energy on achieving their mission - whether that's supporting vulnerable people, delivering community services, enhancing diversity or bringing together the community.

We are focused on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate.

Our policy and law reform work is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and better run, and ensuring that reform takes into account impacts on the not-for-profit sector. Our policy and law reform objectives include:

- **Better regulation for not-for-profits:** promoting efficiency and effectiveness in the regulatory approach to the not-for-profit sector
- **Improved legal structures:** advocating for an improved approach to available legal structures for NFP organisations and social enterprises in Australia
- **Simplified tax concessions:** Addressing complexity and inaccessibility within the current application of tax concessions for the not-for-profit sector
- **Oversight of reforms affecting not-for-profits:** Ensuring that policy development has adequate regard to the potential impact on the not-for-profit sector