

20 August 2014

Dear Department of Social Services

Re: Australia's Charities and Not-for-profits: Options for replacement arrangements following the abolition of the Australian Charities and Not-for-profits Commission*

Not-for-profit Law (NFP Law) (previously PilchConnect) is a program of Justice Connect (previously the Public Interest Law Clearing House). 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, volunteer-based charities. Further details about NFP Law are available at the end of this submission.

We welcome the opportunity to comment on the Options Paper – Australia's Charities and Not-for-profits (Options Paper). We have been actively engaged in discussions as to the role of an independent regulator for the not-for-profit and charitable sector since our establishment in 2008, and strongly support the work and functions of the Australian Charities and Not-for-profits Commission (ACNC). We are therefore grateful for the opportunity to comment on this latest proposal.

Overall, we consider there to be two essential elements to the adequate regulation of charities:

- the independent, specialist determination of charitable status, and
- the maintenance of a publicly accessible register of charitable organisations, including publicly available reported information and constituent documents.

Alongside these two essential elements, we consider three further elements are necessary to establish an effective environment in which not-for-profits and charities can thrive:

- a continued focus on ensuring regulation of the sector is effective, proportionate and useful to support the sector and those who interact with it
- adequate and appropriate support for charities and not-for-profits seeking to comply with the law, including in the form of telephone support, educational initiatives, capacity building opportunities and referral and linking services, and
- harmonisation of laws varying between states (for example, fundraising, incorporation of associations, occupational health and safety, and working with children checks laws).

In our view the ACNC is well placed to deliver meaningful results against these principles, and we consequently strongly oppose its proposed abolition. Nevertheless, in response to the Options Paper, we provide our views in the following format:

1. General comments on the Options Paper
2. Determination of charitable status
3. Retention of register of charities
4. Proportionate compliance framework
5. Transitional issues

We also set out a number of recommendations throughout the response below.

* This submission is endorsed by Cohealth Ltd and Community Information & Support Victoria Inc.

General comments on the Options Paper

Options Paper and consultation process

The Government proposes to abolish a regulatory regime for charities that is the product of 15 years of planning and consultation², which has the support of 81% of charities³, and has been defended by 81% of submissions received on the Bill proposing to abolish the ACNC.⁴

Public consultation on the Government's proposal to unwind this framework for the regulation of charities, which represents a significant departure from the status quo, should be coupled with sufficient information to enable Parliament and the public to properly assess the merits and impacts of proposed alternative approach(es). To date, we believe the Government has not proposed a coherent overarching policy framework for the regulation of charities to replace the existing regime.

This consultation is also being undertaken at the same time as the Centre for Social Impact (CSI) scoping of the proposed National Centre for Excellence, with these consultations being held in isolation and by two separate bodies. It is currently impossible to meaningfully comment and assess the proposals put forward in this Options Paper and in the CSI consultation when the policy debate is fragmented and piecemeal.

We also note that, disappointingly, the Options Paper is not an 'options' paper in the true sense. Instead the paper proposes a single model which is largely the same as the previous flawed system that the ACNC was designed to remedy, with two minor variations listed for comment. This consultation is a critical missed opportunity for debate on a wider range of reform options available for consideration. Resources would be better directed to a more in-depth assessment and dialogue on the aspects of the ACNC that require refinement, as opposed to a starting point that the ACNC be entirely abolished.

A reversion to an untenable regulatory environment

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', noting that it 'lacks coherence, sufficient transparency, and is costly to NFPs'.⁵

We submit that:

- The Australian Tax Office (ATO) and Australian Securities and Investments Commission (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 not-for-profit sector.
- 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).

For a sector that contributes almost \$55 billion to Australia's economy, and employs over 1 million people, having a dedicated regulator for not-for-profits is a proportionate and smart response. We do not see this as paternalistic, instead we see it as an appropriate recognition and acknowledgement of a sector that contributes so much to our society.

² 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 2010 Productivity Commission report on the [Contribution of the Not-for-profit sector](#).

³ Pro Bono Australia, *Red Tape & Compliance Key NFP Issues- Sector Survey Results* (15 August 2013) Pro Bono Australia News <<http://www.probonoaustralia.com.au/news/2013/08/red-tape-compliance-key-nfp-issues-sector-survey-results>>.

⁴ Emma Tomkinson, 'Charities want to keep their regulator: Analysis of submissions to the ACNC (Repeal) (No.1) Bill 2014' on Emma Tomkinson, *A Stream of Social Consciousness* (13 May 2014) <<http://emmatomkinson.com/2014/05/13/the-charity-sector-wants-to-keep-its-regulator/>>.

⁵ Page xxiii, Productivity Commission, *Contribution of the Not-for-profit sector*, 2010.

A key accomplishment of the ACNC to date has been its engagement with the sector, demonstrating a responsive and educative approach to assisting with queries about the regulatory framework for charities. In our experience, this tailored approach has provided significant benefits for the sector, particularly small-to-medium charities. Anecdotal feedback from charities we work with consistently identifies the ACNC as supportive, and an improvement on the previous regulatory regime. For the small volunteer-reliant charities in particular, having officers at the ACNC that they can speak to, who understand their legal structure and the fact that they do not operate like a business (eg. do not have shareholders or in-house accounting teams), is extremely valuable.

At a consultation forum convened by DSS on the Options Paper in Melbourne on 10 July 2014, representatives of the ATO stated that should the regulatory functions of the ACNC be transferred back to it, the ATO would seek to learn from and build upon the cultural and sector-liaison achievements of the ACNC. While this is a welcome assurance, no legislative entrenchment of the ATO's specific role in regulating charities is proposed. We fear that any changes made by the ATO in terms of culture may be susceptible to dilution or alteration over time.

Finally, in the current budgetary environment, we submit that it is very unlikely the ATO will be able to deliver a service approaching the successful model demonstrated by the ACNC. It is of concern to us that no consideration has been made in the Options Paper of the services delivered by the ACNC that were not previously offered by the ATO or ASIC, including:

- specifically trained staff to manage charity enquiries, publish education and guidance material
- a single application point for charitable tax concessions,
- development of a report-once-use-often framework, and
- spearheading ongoing regulatory reform for the sector, including via increased cooperation across federal government agencies and with the States and Territories

The lack of impact analysis

We have concerns about the lack of impact analysis in the Regulatory Impact Statement (RIS) that accompanied the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (ACNC Repeal Bill), introduced into Parliament earlier this year. Given the ACNC Repeal Bill contemplates returning the sector to a regulatory environment that was seriously critiqued by the Productivity Commission in 2010 (not to mention the other inquiries and reviews that preceded it: see footnote 2), it is vital that Parliament has robust information about the impacts of the reforms in order to make a proper assessment of their merits.

The RIS that did accompany the ACNC Repeal Bill stated 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. This has not been provided in this Options Paper (nor in any documentation around the ACNC Repeal Bill).

Recommendation:

- 1. Further public consultation should be conducted to consider options for refining the current ACNC regulatory framework, rather than assuming that the abolition of the ACNC in its entirety is the only way to address identified areas of concern.**

Determination of charitable status

NFP Law has previously outlined that it considers the ATO to have a perceived conflict in its position as both a revenue raising agency and determiner of 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.

The ATO 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.*⁶

Two options have been proposed as solutions to this issue in the Options Paper. We do not consider that either option overcomes the issues highlighted. In particular:

- both options only apply at the objections stage, which means all applications will be determined by the ATO at first instance, with no independent oversight
- neither option appears to make the decision-maker truly independent of the Tax Commissioner
- there is no proposition to add a team of charity specialists to the ATO, or any additional budget to deal with the unique needs of organisations applying for charitable tax concessions, and
- the right to appeal to the Administrative Appeals Tribunal is expensive and time consuming to enforce, and unlikely to be utilised especially by small-medium sized organisations

We submit that a decision-making body that is separate from the ATO should determine applications for charity status. However if decision-making is returned to the ATO, then ATO functions relating to determination of charitable status must be cordoned in a separately identifiable area, and staffed by charity specialists with legislatively-mandated decision-making independence. This team should be responsible for making determinations, publishing guidance material, and answering queries for organisations. We would hope such a team would be able to deliver a speedier service than the service previously provided by the ATO.⁷

Recommendations:

2. **In the event that the ACNC is abolished, the assessment of charitable status and registration of charities should remain the function of an independent decision-making body, identifiably separate to the ATO.**
3. **In the event that the assessment of charitable status is returned to the ATO, a separate branch should be established specifically dedicated to charity regulation and with decision-making independence enshrined in legislation. This branch should be staffed by charity specialists, and have responsibility for making charitable determinations at first instance, produce timely guidance material and respond to charity-specific enquiries.**

Retention of register of charities

The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**the ACNC Act**) establishes Australia's charity register.

The current 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 publicly available register is just as useful for charities themselves to quickly prove their legal status, promote their work and avoid having to report or update the same information, often, to different government agencies, funders or donors.

The register is also important for the large number of foundations seeking to make grants to Deductible Gift Recipient (DGR) endorsed organisations.

The ACNC has put considerable time and effort into building this register. The ATO's data was shown to be poorly maintained and out-of-date (when transferred from the ATO to the ACNC).

⁶ Australian Tax Office, Submission to the Inquiry into Charities and Related Organisations, 2001, available at http://cdi.gov.au/html/public_submissions.htm

⁷ For a comparison between ATO and ACNC timeframes for processing charity applications, we note the submission of the Queensland Law Society to the Senate Economics Legislation Committee's inquiry into the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ACNC

We submit that, if the current regulatory powers of the ACNC are considered to be too onerous, amendments can be made to the ACNC Act – for example making special allowances for certain types of trusts. However, this can be done without dismantling the register, which is a low cost, effective regulatory mechanism. It can also be done without dismantling 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.

Self-reporting

Given resources have now been invested into developing the ACNC register, and charities and the public have now become familiar with the register, the proposal to change to a self-reporting system is inefficient. Based on our discussions with the charitable sector, the proposed system will face opposition and resistance.

Three likely impediments to the proposed self-reporting system, discussed further below, are:

- the requirement for each charity to maintain a website will be impossible to comply with without significant financial or time-cost for many volunteer-run organisations
- reporting through websites means the public has no gateway to easily locate consistent information about charities, and
- there has been no discussion of any incentive to comply with these self-reporting requirements, or how such requirements would be policed (if policed at all).

Maintaining a website

Through our experience providing legal help to thousands of small charities, we can say with confidence that many organisations would struggle to set up and maintain a website. Many charities do not have an existing website, often relying instead on social media to be their internet presence, or having no online presence at all. The time and effort required to set up a website, learn how to upload documents, and ensure their currency, would for many groups be far more burdensome than the time involved in submitting information to the ACNC.

In our experience advising charities and not-for-profits, many people in positions of responsibility in these groups struggle to maintain an email address for their organisation, and some struggle to access our website, let alone set up and maintain their own.

Public access to information on charity websites

The proposed self-reporting on websites would make information about registered charities difficult for the public, donors, and regulators to locate, verify and monitor. The approach fails to meet the objectives of creating a transparent charitable sector where charities are accountable for the public and government money that they receive.

There would undoubtedly be cases where it is extremely difficult to locate self-reported information on charities, particularly where a charity maintains a very basic website that has not been subject to search engine optimisation (either by omission or by actively seeking to inhibit public access), or where an organisation has a common name. By way of example, a Google search for “Angel Foundation” returns page after page of similar-sounding organisations, which would require someone seeking information on a charity with that name to trawl a range of sites to determine which is an Australian registered charity and find relevant information.

One of the benefits of reporting via the ACNC Annual Information Statement is that it facilitates a more sophisticated understanding of the charity sector in Australia. As the Productivity Commission’s report acknowledged, the piecemeal and inconsistent way in which charities report to various regulators (if they report at all) means there is little authoritative aggregated data about the sector. Self-reporting on individual websites, without a central point for collation, authentication or analysis of data, will perpetuate the informational gaps which impede public understanding and analysis of this economically and socially significant sector. The ACNC has already started to analyse and publish some of this important information.

We are also puzzled by the proposed categories of information to be self-reported. The requirement for charities to report on government funding (at state and local levels as well as Commonwealth), even where an organisation is exempt from financial reporting to the ACNC, is incongruous and lacks proper explanation. The absence of a proposed requirement to publish a charity’s constitution or governing documents will limit the ability of interested parties (including those seeking to donate to or support a particular charity) to obtain valuable information about its purposes, membership and governance.

For these reasons, we submit that website self-reporting is impractical, overly burdensome for small charities, and redundant as a mechanism for maintaining a level of public accountability and transparency.

Compliance with self-reporting requirements

The Options Paper does not provide any information on how it would ensure compliance with self-reporting, or how it would police self-reporting requirements. There is a real question as to how enforcing officers will identify cases of non-compliance, with the logistics of monitoring such a proposal extremely challenging. In recognition of these challenges, we argue strongly in favour of retaining a centralised register that provides the public with timely and accurate data on registered charities.

Recommendation:

- 4. The national register of charities be retained and maintained, with no new requirements to self-report via a charity's own website.**

Proportionate compliance framework

Contrary to the assertion that State and Territory governments have appropriate regulatory powers, we know that, like the ATO, State and Territory regulators are under-resourced, and often lack the specific expertise in charity and not-for-profit issues. Indeed, this was one of the contributing factors to the establishment of the ACNC. The ACNC's proven ability to receive and investigate complaints against registered charities in a proportionate, responsive and sector-specific manner should be applauded, and we fear cannot be mirrored should regulatory and compliance functions return to ASIC, ATO and State and Territory regulators.

We do not consider the requirement to provide basic information to the ACNC to be gratuitous. This information forms the basis of the public registry, and ensures that records of charities are up-to-date. As opposed to much of the information reported to State and Territory regulators from charities, the ACNC has demonstrated that it is making use of data collected through sophisticated analysis and engagement with trends. Of course, charitable entities are free to not register with the ACNC should they find reporting too onerous, however in our view the benefits of being a registered charity justify the current reporting and compliance framework administered by the ACNC.

While it is NFP Law's view that unincorporated groups should be required to provide information to the ACNC (albeit very minor information for smaller charities), if this is a particular concern to the Federal Government it would be possible to create an exemption for such groups, while retaining reporting requirements for other charities. Again, we would support proposals to improve aspects of the ACNC through refinement, however we strongly object to approaching policy reform with its abolition as the starting point.

We refer to Recommendation 1 above.

Transitional arrangements

As stated above we submit that the ACNC should be retained, albeit if necessary with altered powers and/or functions on account of the Government's identified concerns. However if the ACNC is abolished, it would be crucial that transitional arrangements give charities generous lead-times before any new obligations are imposed. This would be especially important if the proposed website self-reporting is implemented, as many small volunteer-run charities would need time to establish a website and build additional capacity required to administer it. To assist charities in this regard, should the proposal for self-reporting proceed, we propose DSS should establish program of grants made available to charities and sector-support services, to assist with establishing and maintaining an appropriate website to comply with self-reporting requirements, including assistance with ongoing maintenance, updating and security of data.

More broadly, we note that Australia's charity sector has been the subject of significant national reform in the last couple of years, not only with the establishment of the ACNC but also associated regulatory changes for organisations registered with ASIC, the new Charities Act, and in some areas major funding reforms, such as the

NDIS in the disability space. Further, many parts of the sector have been grappling with state/territory reforms, including for example a new regime for incorporated associations and equal opportunity laws in Victoria, as well as the introduction of harmonised Workplace Health and Safety laws in many jurisdictions.

In our experience, charities and not-for-profits want to comply with their regulatory responsibilities, and the educative and supportive approach of the ACNC has been helpful in assisting charities to understand their obligations and implement good governance practices. Having just come to terms with the ACNC, the winding back of this initiative will be at the expense of many charities who are tired and frustrated with uncertainty and changing regulatory landscapes. This is reflected in sector-based studies and submissions that provide overwhelming support for the retention of the ACNC. Should the ACNC be abolished, significant government resources will need to be invested in supporting the charitable sector through further changes, in particular extensive education and information activities across the country (and, if a National Centre for Excellence is established, ongoing government funding of the sector support organisations it will aggregate and connect).

Recommendation:

- 5. In the event that the ACNC is abolished, significant and ongoing government resources should be invested in education and support initiatives for charities, recognising the critical role played by the ACNC and sector-based support organisations in providing tailored, sector-specific advisory and information services to charities.**

Thank you again for the opportunity to comment on the Options Paper. Please contact us on (03) 8636 4448 or email nfplaw@justiceconnect.org.au should you require more information, or wish to discuss our submission further.

Kind regards



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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 improving legal frameworks 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.