

Submission to the Council of Australian Governments:

21 February 2013

Regulatory impact assessment of potential duplication of governance and reporting standards for charities

PilchConnect welcomes the opportunity to submit our views on the Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities (**the RIA**). PilchConnect has been a supporter of the establishment of the Australian Charities and Not-for-profits Commission (**ACNC**) and remains committed to the reduction of regulatory red tape for charitable organisations as well as the broader not-for-profit (**NFP**) sector.

Below is our detailed submission in response to the RIA, however in summary our key points are as follows:

- Registered charities should be exempt from having to report under State and Territory legislative frameworks, endorsing a 'report once use often' approach through information sharing between the ACNC and State and Territory regulators.
- Ultimately a referral of powers would be the most effective way to achieve national coordination and eliminate duplication of regulation. This may be especially required to effectively regulate directors and officers of registered charities.
- State and Territory regulators and the ACNC should constitute a working group to prioritise consistency across reporting frameworks applying to charitable entities, to assist in identifying and reducing duplication with the ACNC.
- State and Territory regulators should work with the ACNC to ensure that compliance with State and Territory governance obligations will be sufficient to meet ACNC governance standards.

In forming the above recommendations, we make the following general points on the RIA process:

- The timing of the RIA makes it difficult to comment on the extent of duplication in relation to ACNC governance standards as these standards, and affiliated guidance materials, are not yet finalised.
- The RIA is unduly narrow, and ought to assess unnecessary and inconsistent regulatory frameworks which continue to adversely impact on charities, in particular, fundraising regulation and sector-specific standards.

About PilchConnect

PilchConnect is an independent NFP legal service for community organisations - a service of the Public Interest Law Clearing House (Vic) Inc (PILCH). We provide free and low cost legal assistance to NFPs in Victoria, and draw on empirical evidence and practical examples from our work with small 'public interest' groups in our submissions. The reduction of red tape and smarter regulation of the NFP sector are key priorities for our advocacy work. See [Appendix A](#) for more information about PilchConnect.

1. The timing of the RIA process

From the outset, we note that the timing of the RIA consultation process makes it difficult to identify and comment with accuracy on regulatory duplication arising from draft governance standards to be implemented through the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). While we appreciate that COAG has strict timeframes dictating the regulatory reform process for charities, we are concerned that much of the RIA is based on draft governance standards that are themselves currently undergoing a process of public consultation, and are subject to change based on feedback received through that process.

Given the governance standards as currently drafted adopt a principles-based approach, there is significant uncertainty about the level of practical reporting required from registered charities, making it an extremely challenging task to comment with any accuracy on the levels of duplication (if any) that will occur. A more accurate identification and quantification of duplication can only be achieved once the ACNC governance standards have been settled.

We submit that it would be more appropriate for COAG to defer discussions on removing duplication until ACNC standards have been settled, and should instead prioritise its current efforts on the developing consistency amongst State and Territory regulatory regimes as they apply to charitable entities.

2. The scope of the RIA process

We note the RIA expressly states that it will not seek to address opportunities for red tape reduction in areas beyond the scope of the ACNC, including charitable fundraising laws.¹ In our view this is unfortunate, as it is precisely these types of inconsistencies that remain a key frustration and burden for many charitable groups. In our experience, the compliance burden with unnecessary (as opposed to duplicative) regulation is a more significant concern for many charities, particularly those classified as small to medium.

We submit that COAG should be using the current consultation process to look beyond duplication caused by the introduction of the ACNC, and should be exploring practical ways to address inconsistent and unduly onerous State and Territory laws and sector-based standards that create unnecessary red tape, with fundraising laws being high on the priority list. These additional levels of regulation, often imposed by sector-specific standards and funding requirements, are neglected by the RIA yet in our view play a significant role in the assessment of regulatory burden, and rarely represents a 'report once use often' approach that is critical to efficiency with or without the ACNC.

¹ Another opportunity for reducing regulatory duplication (though not addressed by the RIA) is a nationally consistent or agreed definition of charity.

3. Duplication in reporting obligations

The ACNC offers the opportunity for a one-stop-shop regulator for the charitable sector, with identifiable opportunities for the streamlining of reporting.

The most effective option for reducing duplication and creating a single regulatory framework is through a referral of powers to regulate charitable organisations from States and Territories to the Commonwealth as articulated at page 50 of the RIA. However, in the interests of endorsing what we see as the most pragmatic option,² we support the approach outlined at Option 4B of the Consultation Paper, an option that would see State and Territory legislative regimes effectively ‘carve out’ registered charities from having to comply with reporting obligations under their respective incorporating legislation. A similar approach could be achieved with regard to fundraising reporting requirements.³

This approach would allow state-based entities that are also registered charities the ability to file a single set of compliance material with the ACNC, and by virtue of their continued ACNC registration, have no ongoing obligation to further report to their respective state regulator. This option is contingent on sound information sharing between the ACNC and state regulators, and consistency amongst data required from each regulator. It is imagined that each regulator would have a high degree of access to information provided to the ACNC, and such data should be sufficient to allow State and Territory agencies to continue their regulatory oversight of registered charities operating in their jurisdiction.

Until there is consistency between State and Territory regulators on the legislative framework for charitable entities, the process of identifying and minimising duplication becomes extremely difficult, and an effective ‘carve out’ for registered charities reporting to the ACNC is contingent on State and Territory regulators agreeing to relatively consistent levels of reporting. In this regard, we submit that as a matter of priority, COAG should work with State and Territory regulators to develop a consistent approach to the regulation of charitable structures (particularly in relation to governance and reporting), similar to the current reforms being undertaken to introduce a uniform approach to cooperatives.

Recommendation

Registered charities should be exempt from having to report under State and Territory legislative frameworks, endorsing a ‘report once use often’ approach through information sharing between the ACNC and State and Territory regulators.

Recommendation

Ultimately COAG should work towards achieving a referral of powers to the Commonwealth, as this would be the most effective way to achieve national coordination and eliminate duplication of regulation.

² We appreciate that a referral of powers is unlikely to gain the support required from all jurisdictions in a reasonable timeframe, and we therefore consider this to be an ideal yet improbable option.

³ This is consistent with the suggested approach in our submission to the Treasury’s discussion paper on Charitable Fundraising Regulatory Reform, dated 5 April 2012: see <http://www.pilch.org.au/fundraisingreform/>

Recommendation

State and Territory regulators and the ACNC should constitute a working group to prioritise consistency across reporting frameworks applying to charitable entities, to assist in identifying and reducing duplication with the ACNC.

4. Duplication in governance obligations

If the draft governance standards for charities are implemented in their current form (or close to it), we note that several of these standards are likely to generate some level of positive obligation on charities to document or report on matters, particularly those standards relating to financial management and accountability to members.

Indeed, the consultation paper acknowledges that ACNC governance standards as currently drafted are likely to require charities to 'take steps', such as developing policies and procedures. What is unclear is the practical extent of these steps, making it difficult to identify and assess duplication faced by registered charities subject to State and Territory regulatory regimes. The PilchConnect submission on the proposed ACNC governance standards, dated 15 February 2013⁴ (**ACNC Governance Standards Submission**) focuses on the need for clarity and practical guidance on how to comply with the governance principles, and until such guidance is provided we are reluctant to provide further submissions on duplication through governance standards.

Regardless of this uncertainty, we submit that every attempt should be made to align existing governance requirements. In particular, we stress the importance of State and Territory regulators working with the ACNC to ensure that governance procedures contained within each jurisdiction's legislation will be sufficient to meet compliance thresholds set by the pending ACNC governance standards. Where these frameworks are not sufficient to satisfy the ACNC, we submit that COAG should facilitate discussion between ACNC and the relevant State or Territory regulator to reach an agreed level of governance for charities and implement it accordingly.

We submit that each State and Territory regulatory regime with responsibility for the incorporation of charities should have consistent approaches to duties owed by those responsible for the governance of the entity, and we urge COAG to work towards this goal.

Recommendation

State and Territory regulators should work with the ACNC to ensure that compliance with State and Territory governance obligations will be sufficient to meet ACNC governance standards.

5. Duplication in relation to directors' and officers' duties

While the Consultation Paper indicates that Option 4B would apply to reporting requirements, it is unclear whether COAG anticipates that this option would seek to extend to duties placed on committee members and officers of charities through State and Territory legislation.

⁴ See <http://www.pilch.org.au/federalreform>

In our view, at least initially the scope of any 'carve out' should only extend to reporting obligations, and should not apply to legislative standards of behaviour imposed on committee members contained in each State and Territory regulatory regime. In this respect we note that the proposed ACNC governance standards as currently drafted will apply to the charities rather than the individuals controlling them. In absence of legislative duties applying directly to those in a fiduciary relationship with a charity, we submit that State and Territory regimes remain best placed to apply these standards. We acknowledge that there are differences in the expression of legislative duties across state/territory incorporation legislation and different legal structures; and that incorporation laws in some jurisdictions do not set out legislative directors' duties at all. This is not ideal, however, given the constitutional issues involved, it appears to us that the best approach would be to avoid further complexity until a referral of powers to the Commonwealth can be achieved, which would enable the ACNC to enforce breaches of directors' duties of charities regardless of their legal structure.

This approach is consistent with our views as articulated in our ACNC Governance Standards Submission, where we formed the view that provisions in the Corporations Act as they relate to duties of directors ought not to be 'turned off' as is set to happen on 1 July 2013. Our arguments supporting this approach can be found at page 3 of that submission under the subheading '*The application of some standards to charities, not their directors, is problematic*'; see also the discussion and recommendations in relation to Proposed Standard 6 on pages 15-16.

Recommendation:

The 'carve out' arrangements recommended above should, at least initially, relate only to reporting obligations on charities, and not to directors' duties. A referral of powers would be the most effective mechanism to achieve nationally consistent regulation of directors/officers of registered charities.

6. Conclusion

Thank you for the opportunity to contribute to this consultation. We would be happy to elaborate on any of the issues raised in this submission on request.

Yours sincerely,



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Endorsements

This submission is endorsed by the following organisations:

- Arts Law Centre of Australia
- Association of Neighbourhood Houses and Learning Centres
- Public Interest Law Clearing House NSW
- Women's Legal Service Victoria

APPENDIX A

About PilchConnect

PilchConnect is an independent, specialist community legal service that provides not-for-profit (NFP) organisations with access to free or low cost legal help (information, advice and training). We support small-medium NFP community organisations to be better run. We do this because when organisations are well run, they are more likely to achieve their mission, and trust and confidence in the NFP sector is likely to be improved.

By supporting NFPs in this way, we aim to contribute to a better civil society with more connected communities.

We fill a niche role; sitting between regulators and the private legal profession. As an independent, sector-based intermediary we understand the practical constraints that small community organisations operate under, and are trusted by them to provide practical, NFP-relevant legal help or direct them to other assistance. We often help organisations work out if they really do have a legal problem, how serious it is and what possible next steps are. We prioritise NFPs that assist marginalised and disadvantaged people and in rural and regional areas.

Our submission work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work.