

Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation

28 February 2018

About us

Baptist Care Australia is the national representative body for Baptist community service organisations. We work to bring social justice to Australian communities, advocating nationally on issues important to our members.

Baptist Care Australia members serve people in aged care, affected by family violence, experiencing homelessness, on low incomes, experiencing relationship breakdown, living with a disability, and affected by multigenerational disadvantage. Services include crisis accommodation, social housing, out of home care for children, counselling, no and low interest low schemes, and other programs that help people rebuild their lives or live independently with the right support.

With a combined annual turnover of \$700 million, Baptist Care Australia members employ over 9,000 staff and engage with more than 2,500 volunteers annually.

Baptist Care Australia is a company limited by guarantee, a registered charity and a public benevolent institution with income tax deductible gift recipient status.

Introduction

This review of the Australian Charities and Not-for-profits Commission (ACNC) legislation gives the sector and community an opportunity to comment on the work of the ACNC over the past five years. Baptist Care Australia has been and is supportive of the ACNC and the work that it has done to support the sector. The ACNC's educational approach to good governance has improved knowledge and skills within the not-for-profit sector, and has enabled organisations to improve when they have experienced governance challenges.

There is some concern, however, that there may be a change of focus away from helping charities to succeed to an approach that emphasises minimising misconduct and reducing risk. Overwhelmingly, the majority of charities are meeting their compliance obligations as part of the ACNC Act, and any potential change in focus undermines public confidence in the sector by implying otherwise.

The ACNC has had a positive impact on the regulation and perception of the charity sector since its formation in 2013. The ACNC was formed with wide sector support and consultation, after a desire for a more cohesive and transparent charity and not-for-profit sector. There are however a few areas for improvement that have been identified as charities have had time to acquaint themselves with their new obligations under the ACNC Act. These are:

- Interaction with the Corporations Act
- Conflict between state and federal regulations (or red-tape reduction)
- Communication constraints regarding investigations
- Scope of the ACNC Commissioner's powers
- Focus on not-for-profits as well as charities

Objects of the ACNC Act

Baptist Care Australia believes that the current Objects of the ACNC Act are still reflective of the needs of the sector and do not require amendment. The current Objects were developed with input from the sector and on the whole have served the regulator well in setting out the ambitions of both the ACNC and the charity sector. In our view, not enough time has passed since the introduction of the Act for a change in focus, as there is still much core work to be done around these three objectives. Should the Objects be reviewed at a later date, this should again be done in consultation with the sector.

Recommendation:

The Objects of the ACNC Act remain as written in the Act

We note that the ACNC recommended the addition of two new objects to the act: to promote 'the effective use of the resources of not-for-profit entities'; and to 'enhance the accountability of not-for-profit entities to donors, beneficiaries and the public'¹. While the intent of these additional objects is understood, further clarity must be required regarding how a charity would be assessed in using its resources 'effectively'. Effectiveness is subjective and will be different for each charitable organisation. Also, the second recommended objective is very similar to the existing objective in maintaining and enhancing public trust and care should be taken to not duplicate objectives. It is for these reasons that Baptist Care Australia is not supportive of the addition of these two additional Objects.

Baptist Care Australia cautions against any sudden amendments to the Objects and the ACNC legislation more broadly. Any kind of legislative change can create uncertainty and a subsequent burden of practice change by those impacted by new law. Should the committee feel that changes do need to be made to the ACNC Act, Baptist Care Australia urges that these be done in a measured and consultative manner to give charities and not-for-profits sufficient time to adapt.

Interaction with the Corporations Act

There is some concern about the interaction of the Corporations Act and the ACNC legislation for those charities that are also companies limited by guarantee. These concerns are mostly due to the continued publication of out-of-date information by ASIC, confusion around the appointment of charity company secretaries, suitability of responsible persons, the publication of business address details, and the practical application of director's duties arising from differences between common law, the Corporations Act and the ACNC Governance Standards. It can also be argued that the ACNC governance framework reduces the accountability of individuals working for registered charities that are incorporated under the Corporations Act.

In addition, there have been instances where charities have had difficulty executing documents when documents need to be signed on behalf of the company as the listing of 'responsible persons', publically accessible on ACNC website, lists only the directors. Given the Company Secretary, an authorised signatory of registered companies is not listed, there is no way a third party can independently validate the information. It would be prudent in this instance to update the responsible persons listed in the legislation to bring it in line with the directors' duties under the Corporations Act and include the addition of Company Secretary in the responsible persons listed for companies by the ACNC.

Recommendation:

The Review Panel work with both the ACNC and ASIC to reduce some of the duplication, ensure consistency of information and resolve uncertainties in the operation of the Corporations Law and the ACNC Act.

The suitability of responsible persons under the ACNC regulations be better defined.

Company secretaries are included as a responsible person for companies listed by the ACNC.

Addressing the conflict between state and federal regulations

Since the inception of the ACNC in 2013, there has been significant ground work in the reduction of red tape for charities.

For a significant number of charities, fundraising is the source of the greatest amount of regulatory burden. There is no unified statutory regime for fundraising, and currently fundraising legislation differs significantly between state and territory jurisdictions.

Fundraising regulation has not kept pace with changes in technology and the ways that organisations are now seeking philanthropic funds. Regulation currently treats fundraising as an isolated activity in one state or territory when in reality; charities are frequently supported by donors interstate and even internationally through online channels.

As one key role of the ACNC is to reduce unnecessary regulatory obligations, it would seem prudent that the ACNC have a role in streamlining the fundraising process throughout the country.

In addition to driving fundraising reform, it is important that the ACNC continues to work with state and territory governments to reduce the compliance burden on incorporated associations. Currently these charities are required to report separately to their state or territory regulator as well as the ACNC – ideally, the ACNC would act as the ‘one stop shop’ allowing data access to the state regulators without the duplicated reporting.

Recommendation:

Consideration is given to the introduction of a single, unified Australian statutory regime for the regulation of charitable fundraising, and the ACNC takes a proactive role in progressing this initiative.

Addressing communication constraints regarding investigations

Other submissions to this Review² have commented on the limitations s150 of the Act creates on allowing the ACNC to meet its objectives and reduces the opportunity for the sector to learn from real case situations and compliance outcomes. While it is important that the privacy of individuals and personal information be protected, confidence in charities will be strengthened if both the sector and the general public know and understand why the ACNC has taken compliance action. The ACNC should be able to confirm whether it is investigating a particular charity and provide reasons for decisions resulting from any investigations.

Recommendation:

The Review Panel should consider modifying the secrecy provisions in the legislation to allow for better transparency.

Reconsidering the scope of the ACNC Commissioner’s powers

The Terms of Reference of this Review specifically question whether the powers of the ACNC Commissioner are right in addressing the risk of misconduct by charities and not-for-profits or those that work with them. Consequently, there has been much discussion regarding the appropriateness and scope of the ACNC Commissioner’s powers. Baptist Care Australia believes at this point in time there is little evidence to suggest that the powers of the Commissioner are inadequate or a barrier to the ACNC achieving its goals. Any changes to the Commissioner’s powers should be carefully thought out, with particular attention to how these powers may be interpreted and how they would interact with other pieces of legislation.

Recommendation:

No changes are made to the ACNC Commissioner’s powers at this point in time.

A strengthened focus on not-for-profits as well as charities

As the ACNC continues to mature, it is reasonable to suggest that the scope could and should move from just focusing on charities to supporting the broader not-for-profit sector. As its name implies it was always the intention that the ACNC be responsible for the regulation of both charities and not-for-profits. Given this scope, and providing the goal of the ACNC remains to support and improve its registered organisations, other classifications of not-for-profits should be included. This however should not be done at the expense of the charity sector and may need a staged approach.

Recognising that much of the regulation involving not-for-profit organisations is held at a state and territory level, this Review provides an opportunity for consideration and action at a federal level to

try to consolidate and seek agreement with the states and territories about how to best ensure the not-for-profit sector is sustainable into the future.

Recommendation:

The ACNC be allowed to grow in capacity over time to support all types of not-for-profit organisations in Australia, not just charities.

Conclusion

The national regulatory system supporting charities and not-for-profits should promote good governance, accountability and transparency. We see the main role of the ACNC to be supporting and sustaining a robust, independent and innovative sector.

At a time where governments are frequently changing policies relating to funding for charities and not-for-profit entities to provide services, any changes to the ACNC legislation should be made carefully and based on sound evidence. The risk is introducing additional regulatory impositions on a sector that is often under resourced and largely working to advocate on behalf of and provide for some of the most vulnerable people in our community.

We look forward to the recommendations of this review and hope to continue to work with the ACNC as part of an efficient and productive not-for-profit sector.

¹ Australian Charities and Not-for-profits Commission, submission to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation, available: <https://www.acnclegislationreview.com.au>

² Australian Charities and Not-for-profits Commission Advisory Board, submission to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation, available: <https://www.acnclegislationreview.com.au>