

9 April 2014

Our ref NFP/23

Chair
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By Post and Email: economics.sen@aph.gov.au

Dear Chair

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

Thank you for the opportunity to provide comments on the *Australian Charities and Not-for-profits Commission (Repeal) (No.1) Bill 2014 (the No. 1 Bill)*.

The Society wishes to comment on two aspects, namely the legislative process adopted and the content of the Explanatory Notes and Regulatory Impact Statement.

Please note it is not suggested that this submission represents an exhaustive review of the Bill and materials. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

The *Australian Charities and Not-for profits Commission (Repeal) (No. 1) Bill 2014 (the No. 1 Bill)* starts a somewhat unusual process intended to unfold in two stages to repeal the ACNC Act and associated legislation. Reference is made in the No. 1 Bill to an *Australian Charities and Not-for-profits Commission (Repeal) (No.2) Bill 2014 (the No. 2 Bill)* to be introduced at some later date. Part 1, Schedule 1 to the No. 1 Bill repeals the ACNC Act, but will not come into effect until Schedule 1 to the No. 2 Bill commences. We note that as the No. 2 Bill is yet to be introduced, the timing of this is uncertain.

The Society wishes to make the following points:

- The process is, in our submission, somewhat problematic, given the current government's intention to reduce obsolete legislation on the statute books by adopting a two stage legislative process;
- Such a convoluted legislative process inevitably creates uncertainty amongst charities as to their future obligations to and reporting requirements for the Commonwealth government;

- The unclear situation makes good administration by the current ACNC extremely difficult, which is surely an unnecessary outcome; and
- Informed debate on the No. 1 Bill is effectively impossible as many of the issues necessarily raised cannot be considered in isolation, and cannot be adequately addressed without analysing the No. 2 Bill. This appears to add "red tape" to a sector already suffering from reform fatigue.

The Society is particularly concerned with the Explanatory Memorandum (EM) and the Regulatory Impact Statement (RIS) being less than rigorous, and not meeting the usually high standards and disciplines of Commonwealth legislative processes. We make the following points in relation to the RIS:

- The RIS states the objectives of the repeal provision (at p. 3) as being to give effect to a government election promise. We can find no direct reference to such a promise in the Coalition's formal election platform¹ and it was not included as a policy commitment in the Coalition's election costings.² Further, the RIS asserts that there is no need to consider alternative options 'as this proposal is implementing an election commitment'.

The RIS (p. 2) states that 21,000 unincorporated charities are required to report to the ACNC where they previously were outside a regulatory framework. This appears not to take into account that these charities are already subject to federal regulation which is fragmented and uncoordinated. They may also be required to comply with financial grant acquittals, which is where the bulk of compliance costs practically reside. The ACNC charity passport sought to streamline commonwealth government information requirements of such bodies. We note that the ACNC charity passport will facilitate the Commonwealth Grant Guidelines (paragraph 4.7 in Part 1) being:

4.7 Agency staff should not seek information from grant applicants and grant recipients that is collected by other Commonwealth entities and is available to agency staff. In particular, agency staff must not request information provided to the Australian Charities and Not-for-profits Commission (ACNC) by an organisation regulated by them. When determining whether acquittal or reporting requirements are required, agency staff must have regard to information collected by regulators, such as the ACNC. If an entity provides an annual audited financial statement, then a financial acquittal should not be required, unless the granting activity is higher risk.³

¹ Found at: <http://www.liberal.org.au/our-policies>

² Found at: <http://www.liberal.org.au/latest-news/2013/09/05/final-update-federal-coalition-election-policy-commitments>

³ Guidelines can be found here: <http://www.finance.gov.au/sites/default/files/FMG-3-Commonwealth-Grant-Guidelines-June-2013.pdf>

- The RIS (p. 2) asserts that 6000 incorporated associations that are charities are burdened with duplicative reporting due to the ACNC. This appears to overstate the issue of duplication as the ACNC Commissioner has exercised her discretion to accept State and Territory reports in the immediate future, so that there is no requirement to produce an additional set of reports. One purpose of this initiative by the Commissioner is to provide time for the ACNC to continue the work of harmonising reporting requirements so that States and Territories accept the ACNC reports, in the way that has been achieved in South Australia and the ACT.
- The RIS (p. 3) states that the ACNC was established with the intention that it be a single reporting point for charities but that this has not eventuated. This fails to acknowledge the progress made in setting up a framework for streamlined reporting in the ACNC's first 15 months. The RIS does not refer to the other objects of the ACNC Act, and whether these are being achieved. Nor does it refer to the timeline for achieving these objects. Given that the ACNC Act has a legislative review period of five years, it is not unreasonable to work on the basis that 5 years rather than 15 months may be a reasonable period within which to evaluate outcomes and achievements of the ACNC.
- The RIS fails to mention the regulatory gaps and inconsistencies that were associated with regulation by the Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO) and makes no assessment of the consequences of returning regulation, piecemeal, to these agencies. The RIS also makes no mention of the graduated regulatory powers that the ACNC is able to exercise, which are very different from those available to either the ATO or ASIC.
- The RIS (p. 4) refers to the Minister's consultations with 'a range of stakeholders'. No detail is given about the terms or content of these consultations, the methodology used, details of stakeholders actually consulted, or the outcomes of the consultation. We note in the Coalition's election policy:

6. Genuine consultation with business and the community

The Coalition will engage in genuine consultation with business, the not-for-profit sector and the community before introducing legislation and regulations. We will work with these groups to stop unnecessary red and green tape from being introduced in the first place.⁴

The Society considers that good policy requires appropriate public consultation and this does not appear to have been undertaken in this instance.

- The RIS (p. 4) erroneously refers to the abolition of the New Zealand regulator: the charities regulator still exists in New Zealand, but in a different form, as Charities Services.⁵

⁴ Found at <http://www.liberal.org.au/boosting-productivity-and-reducing-regulation>

⁵ Information about Charities Services New Zealand can be found here: <http://www.charities.govt.nz/>

- The RIS (p. 3) states that the intention of the government is to return the functions transferred from ASIC and the ATO to these bodies, allowing similar regulatory oversight at a reduced cost. We note that in a press release the Minister said:

As the regulator of every Australian taxpayer, the Australian Tax Office is more than capable of overseeing the work of charities – it's done it before, it can do it again.⁶

The ATO itself stated in a submission to the Inquiry into the Definitions of Charities and Related Organisation (2001):

It is also our view 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, such as occurs with the Charities Commission in the UK for example. (available at http://www.cdi.gov.au/html/public_submissions.htm)

We support this view being considered in the context of this Bill.

- The ACNC has early achievements which we suggest should be recognised:
 - In 2010 the ATO's service standard for processing applications for income tax and gift deductibility status was 28 days. However, the Australian National Audit Office's (ANAO) review of ATO administration of Deductible Gift Recipients (2009–10) found the average time to process applications was 36.7 days.⁷ The audit noted that some applications requiring assessment by other Commonwealth agencies could take up to two years.⁸ At the time, there were 206 applications (7.8%) which had taken over 90 days, and seven (0.3%) had taken more than two years.⁹ Further, at the time of the ANAO report, 55% of DGR applications were finalised within thirty days. In early 2013, with the addition of the ACNC, the rate had improved considerably: 98.6% of applications to the ACNC and 95% of applications to the ATO were finalised within fourteen days of filing.¹⁰
 - This is a significant achievement, given the introduction of a new process and involvement of two offices with different computer systems. Further improvement is expected over time and when a new computer system allows for seamless transfer of information between the ACNC and ATO.
 - In its first full year annual report the ACNC reported:¹¹

⁶ Found at: <http://kevinandrews.dss.gov.au/media-releases/60>

⁷ Auditor-General (Commonwealth), *Administration of Deductible Gift Recipients (Non-profit Sector): Australian Taxation Office, Audit Report No 52, 2010–11: Performance Audit* (Australian National Audit Office, 2011), 23, <http://www.anao.gov.au/~media/Uploads/Audit%20Reports/2010%2011/201011%20Audit%20Report%20No%2052.pdf>

⁸ *Ibid* 26.

⁹ *Ibid* 82.

¹⁰ Presentation by ATO and ACNC Officers at ATO Charities Consultative Committee Meeting, 26 March 2013, item 5.

¹¹ Found at:

http://www.acnc.gov.au/ACNC/About_ACNC/Corporate_info/Annual_Reports/2012_13/S3/ACNC/Publications/Reports/Annual_Report_2013/Section03.aspx?hkey=1f265d62-52c1-4a4b-ab14-cef5fc72cada

Item	Benchmark	Achieved
Combined time for ACNC to determine charitable status and Australian Taxation Office to decide on tax concession	85% within 28 days	95.6%

- The Society's members acting on behalf of charities continue to experience long delays with the ATO in relation to Australian Business Numbers (ABNs) (and related tax concessions), mergers, amalgamations, migration to different entity types and corrections of the Australian Business Register (ABR). Many ATO officers are sympathetic to the time delays involved which involve the inflexibility of the ATO computer systems. Further it has become apparent to all professional advisors that the state of the data set handed by the ATO to the ACNC was poor and this was despite the ATO in the months immediately prior to the handover attempting to cleanse their records. This pattern of behaviour over many years does not recommend the ATO in this area of regulation.
- Another example of the success of the ACNC has been their timely response to legal developments and dissemination to the sector:
 - An example is the recent case of *The Hunger Project Australia v Commissioner of Taxation [2013] FCA 693* handed down by the court on 17 July 2013. The ACNC issued an interpretation statement (its view of the ramifications of the case for charities and legal practitioners) some **33 days** later on 28 August 2013.
 - By comparison in the same case, the ATO issued a mere notice of the decision and intention to appeal in its news service on 19 September, 2013¹² **65 days** after the decision (in which it was a party) and we understand that no decision impact statement or guidance as to their view of the law has yet been issued.
 - The ATO has a pattern of long delays in dissemination of information to practitioners and the sector. For example, the important case of *Commissioner of Taxation v Bargwanna [2012] HCA 11* handed down on 29 March 2012 took **470 days** for a decision impact statement to be released for comment on 11 July 2013.¹³ The *Commissioner of Taxation v Word Investments Ltd [2008] HCA 55* decision was handed 3 December 2008 and **175 days** later on 26 May 2009 the impact statement was released.¹⁴

¹² Found at: <http://www.ato.gov.au/Non-profit/Non-profit-News-Service/In-detail/Articles--2013-14/Non-Profit-News-Service-No--402--Hunger-Project-Case--Federal-Court-allows-appeal/>

¹³ Found at: <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/S284-2011/00001>

¹⁴ Found at: <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/M41/3008/00001>

To underscore the above, on 20 March 2014 (the day after the No. 1 Bill was introduced) the ACNC gave notifications on its web site and social media outlets of the introduction of the Bill.¹⁵ As at the date of this letter notice is yet to appear on the ATO website or e mail news service.

- This demonstrates that the ACNC is a nimble, focused and fit for purpose regulator, whilst the ATO systems are primarily designed for their core responsibilities. These do not appear to accommodate the particular profile or needs of the charities sector.
- Finally, the inherent conflict of having the arm of Government charged with maximising the tax revenue as also determining the entitlements to tax concessions remains unaddressed by the Explanatory Memorandum and the RIS.

Further, if the government is concerned with the burden of reporting requirements then we suggest that the government merely alter these by legislative amendment or carve out certain bodies from those reporting requirements.

Thank you for the opportunity to provide this feedback. We note that we have provided our views to the Minister for Social Services and the Shadow Assistant Treasurer.

Yours faithfully



Ian Brown
President

¹⁵ Found at: http://www.acnc.gov.au/ACNC/Comms/LN/Update_Status_of_ACNC_Act.aspx