

Review Panel

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

C/o Principal Adviser, Individuals and Indirect Tax Division

The Treasury

Langton Crescent

PARKES ACT 2600

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Dear Review Panel,

I write to provide further input on ensuring good practice regulation of Australia's charities through the ACNC five-year review, following your invitation to me to make a submission building on my comments at the Melbourne roundtable you conducted on 8 March 2018.

I make this submission on the basis of my ongoing work to support the trust and confidence with which Australian charities are held. My expertise is drawn from the work I undertook and continue to publish on as a Fulbright Professional Scholar in Nonprofit Leadership;¹ and from my professional experience across Australia's charitable landscape, including my current role as CEO of national charity Health Justice Australia.

At the Roundtable I raised my concerns about submissions before you arguing for an extension of exemptions for small charities from the ACNC's reporting and regulatory functions. Ensuring that charity regulation is proportionate and fit-for-purpose have been guiding principles during the ACNC's establishment, reflected in the significantly reduced reporting obligations of small charities compared to their larger colleagues in the sector. However there is no policy logic to exempting certain charities (small or otherwise) from the regulatory and investigatory powers of the ACNC.

The existing exemptions applied to Basic Religious Charities take them out of the purview of the ACNC for some of its key regulatory powers. Yet small charities are not immune from the kinds of actions that warrant the ACNC's investigatory and regulatory powers. Analysis of the ACNC's most recent compliance

¹ See my original report of my Fulbright work, 'Lead or be left behind: Sustaining trust and confidence in Australia's charities', http://www.originfoundation.com.au/sites/default/files/ORI2414_FulbrightScholarReportScreen_02.pdf; and more recently, <https://www.healthjustice.org.au/2018/03/08/crisis-or-not-we-need-to-demonstrate-our-trustworthiness-if-we-want-people-to-trust-us/>.

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report makes it clear that small charities constitute a significant part of the investigatory and regulatory work the ACNC to date. Meanwhile, we are in a period of heightened concern about the good governance of charities, reflected both in declining institutional trust;² and in specific processes such as the Royal Commission into Institutionalised Sexual Abuse. We should be strengthening and safeguarding the mechanisms of transparency and accountability across the sector, including through the ACNC; not eroding them by exempting more charities from them.

In the Roundtable discussion, the Review Panel noted that the ACNC's power to remove existing and appoint new people to charity Boards is one of the key objections being mounted by those seeking to retain the BRC exemption and extend it further. You noted that Basic Religious Charities fear the ACNC might appoint someone who is not in keeping with a particular charity's purpose, such as its faith, in the exercise of this power.

Firstly, I note that this is a risk faced by all charities subject to these powers, irrespective of their purpose or mission: its implications are no more serious for a religious charity than for others. Take for example an investigation into one of the many charities I work with, supporting women and children experiencing family violence. If the ACNC were to execute its powers to remove existing Board members from a family violence charity and appoint in their stead someone who believed family violence to be a private matter, not one requiring public policy and services to address it, this would place that charity in an unenviable - and potential untenable - position.

Before we address ways to mitigate this risk, it is important to recognise what prompted the establishment of these powers in the first place. The ACNC may be investigating actions that are extreme in their nature, for example in cases of fraud or the transfer of charitable proceeds to non-charitable purposes. In these cases, the ACNC removing someone from a Board may be the only way to stop serious actions such as a charity's funds being sent overseas. Removing or curtailing these powers could erode the only mechanism the ACNC has at its disposal to prevent further harm in such circumstances.

The question before the Panel is how to ensure good (and ideally best) practice regulation of charities, in the interests of a charitable sector in whom the public has trust and confidence, through the ACNC legislation. Without a clear policy purpose, exemptions from the ACNC's power do not serve this end.

² See for example the findings of the Edelman Trust Barometer; and closer to home, the ACNC's own research on public trust and confidence in Australian charities, http://www.acnc.gov.au/ACNC/Publications/Reports/Public_Trust_2017.aspx.

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However there are a couple of ways to ameliorate fears that this power may be used in a way that undermines a charity's purpose.

i. Limiting the expression of this power on the basis of appropriateness

This could be addressed quite simply. For instance, there is room to include within the ACNC's explanatory memorandum a provision for an ACNC appointment to be a person suitable to the type of charity in question.

i. A court sanction

A court sanction on the ACNC's process to install a new Director could provide the basis for approval or appeal of the ACNC's exercising of this power. For instance, a 60-day review after the ACNC had inserted a new appointment would ensure that the prevention-of-harm elements outlined above could be preserved, while also providing a clear opportunity to have the ACNC's decision of any new appointment affirmed or reviewed.

While a court review or right of appeal provides for a transparent and accountable process, it does raise some challenges.

- It can be expensive, and neither the ACNC nor many of the charities it regulates have budgets to accommodate such costs currently.
- It can be time-intensive, which makes it important to balance a court's ability to act as a check on the appropriateness of an appointment by the ACNC with the ACNC's ability to continue its investigatory and regulatory functions.

My intention with these proposals is to ensure that, in addressing one set of concerns about the ACNC's power to appoint new Board members, we don't create unintended consequences or erode the ACNC's core functions (and therefore its value). As these are important issues of policy, so too the options to address them require further development to ensure they address the present concerns without themselves creating unintended consequences.

Yours sincerely,



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