



Law Council
OF AUSTRALIA

Legal Practice Section

28 February 2018

Mr Patrick McClure AO
Chair
ACNC Legislation Review Panel
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ACNCReview@treasury.gov.au

Dear Mr McClure,

Review of Australian Charities and Not-for-Profits Commission Legislation

The Law Council is grateful for the opportunity to make a submission in regard to the Review of Australian Charities and Not-for-Profits Commission Legislation.

Please find attached the Law Council's submission which has been prepared by the Not-for-profit Legal Practice and Charities Committee of its Legal Practice Section.

For further comment or clarification on any of the matters raised in the submission please contact Jennifer Batrouney QC, Chair, Not-for-profit Legal Practice and Charities Committee on (T) 03 9225 8528 or at (E) Jennifer.batrouney@vicbar.com.au.

Yours sincerely

Jonathan Smithers
Chief Executive Officer



Law Council
OF AUSTRALIA

Review of Australian Charities and Not-for-Profits Commission Legislation

The Treasury

28 February 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Morry Bailes, President
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- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Not-for-profit Legal Practice and Charities Committee of its Legal Practice Section for preparing this submission.

The Committee was established in March 2016 and comprises leading practitioners in the not-for-profit area from around Australia:

The objectives of the Committee include:

- to engage with financial accountability and taxation laws and policies that affect NFP organisations;
- to promote the administration of justice and the development and improvement of laws and policies affecting NFP organisations; and,
- to contribute to the implementation of the Law Council's International Strategy.

Introduction

1. This submission is made by the Charities and Not for Profit Committee of the Legal Practice Section of the Law Council of Australia (**the Committee**).¹ The Committee is comprised of lawyers and academics with specific expertise in the area of the law of charity. This submission is informed in part by the practical experience of its members in dealing with the ACNC and the legislation that governs it, on behalf of Not-for-profit (**NFP**) clients. It contains a number of suggestions to strengthen and enhance the effectiveness of the ACNC legislation.
2. At the outset, the Committee wishes to make some general comments about the ACNC. It acknowledges and affirms the success of the ACNC in its first five years, and in particular, acknowledges the following achievements:
 - The development and publication of user-friendly educational material for charities.
 - Its success and ongoing efforts to reduce red tape, particularly by working with State Government regulators in the areas of incorporated associations and fundraising.
 - The establishment of a freely available public register and the work it has commenced in ensuring it is up to date and accurate.
 - Making its staff accessible and available, including at senior levels through the Professional User Group and Sector User Group.
 - The development of Commissioner Interpretation Statements and the process of consultation adopted in their development.
 - Its regulatory approach, emphasising education and rectification as the first step.
 - Its ongoing efforts to understand the NFP Sector and develop its role as a specialist regulator.
 - Establishing a principally web-based *modus operandi* with charity portal and charity passport.

ACNC Objects and Regulatory approach

ACNC Objects

Question 1: Are the Objects of the ACNC Act still contemporary?

3. Although the Committee is supportive of the existing Objects, it is open to some minor amendments to strengthen and clarify the aims of the ACNC.
4. The Objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**the Act**) are significant. They are referred to and relied on in several places in the Act

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

to guide the Commissioner in the exercise of his or her functions,² and they can inform the overall regulatory approach taken by the ACNC to its functions.

5. The Committee affirms the supportive approach taken by the ACNC to date, and in particular, its emphasis on education in the early stages of its existence and its commitment to risk-based and proportional regulation.
6. If the Panel is minded to recommend change in relation to the Objects, the Committee would support the following:
 - That there is an overarching Object of supporting and sustaining a robust, vibrant, independent and innovative Australian Not-for-profit Sector because of its contribution to public benefit.
 - That under that overarching Object are two sub-objects, which are ancillary. They are the Objects of maintaining public trust and confidence, and promoting reduction of red tape.
7. The Committee does not support expanding the Objects to include the additional Objects suggested in the Submission by the Australian Charities and Not-for-profits Commission to this Review (**ACNC Submission**). They are:
 - Promoting the effective use of the resources of Not-for-profit entities.
 - Enhancing the accountability of Not-for-profit entities to donors, beneficiaries and the public.
8. The Committee considers that the present Objects are adequate and that expansion to include such Objects is not necessary and potentially confusing.

Regulatory approach

Question 9: Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?

9. The approach that the ACNC has taken to the regulation of the NFP Sector is summarised in its Regulatory Approach Statement.³ The Committee is supportive of the general risk-based proportionate approach that the ACNC has taken to its functions,⁴ and in particular, it:
 - Affirms the emphasis that the ACNC has placed on providing guidance, education and advice.
 - Affirms its presumption of honesty, and its commitment to acting proportionally and consistently in cases of misconduct or non-compliance.

² *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15.10 (Commissioner to have regard to certain matters in exercising powers and functions), s 25.5 (Entitlement to registration), s 40.10 (Commissioner may withhold or remove information from Register), s 45.5 (Governance Standards), s 60.95 (Commissioner may approve collective or joint reporting by related entities), s 130.5 (Annual Report), s 150.35 (Exception – disclosure on Register to achieve objects of this Act), s.150.40 (Exception – disclosure to an Australian government agency).

³ Australian Charities and Not-for-profits Commission, *Regulatory Approach Statement* <https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09>.

⁴ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15.10(e).

- Acknowledges the ACNC’s statement that ‘the foundation of the ACNC’s regulatory approach is an understanding of charities’ and encourages the ACNC to continue this approach.
10. The Committee understands that there can be some challenges inherent in a regulator whose objects include ‘supporting and sustaining’ the Sector, as described by Nolan Sharkey and Ian Murray in *Reinventing administrative leadership in Australian taxation: beware the fine balance of social psychological and rule of law principles*.⁵ The Committee submits that the ACNC should continue to adopt an evidence-based approach to identify and address specific issues, rather than respond to anecdote.
 11. The Committee does not consider that there is sufficient evidence to demonstrate that a change in approach with greater emphasis on deterring misconduct is required, or indeed, would be helpful.
 12. The Committee notes that the Australian Taxation Office (**ATO**) has embarked on a significant ‘reinvention’ program, with the intention that it foster ‘willing participation’ and become more ‘client focused’ and customer ‘service oriented’.⁶ Recognising that the ATO relies on a voluntary compliance model, the presumption is that this regulatory approach is intended to facilitate greater compliance. The Committee suggests that consideration is given to the ATO experience before contemplating any change in regulatory approach at the ACNC.
 13. The Committee also notes that before contemplating any change to regulatory approach, some value may be obtained by considering the experience in England and Wales. While the statutory framework in that jurisdiction seems, on its face, robust and sector-oriented, the regulatory culture has generated problems.⁷

Expansion of the ACNC to cover the whole NFP Sector

Question 3: Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

14. The Committee considers that there is benefit in adopting one regulatory framework for NFP organisations, particularly those with similar tax concessions. However, there is also benefit in protecting the culture and unique nature of the ACNC as a dedicated charities regulator.
15. If the regulatory framework is to be extended, the Committee submits that it should not be attempted all at once. Thought should be given to a plan and process that has regard to:
 - Identifying the total scope of the Sector and what common themes or issues for regulation exist.
 - Categorisation based on the nature of the tax exemptions. Division 50 is a good place to start; alternatively, the inclusion of non-charitable Deductible Gift Recipient (**DGR**) entities.

⁵ Nolan Sharkey and Ian Murray, ‘Reinventing administrative leadership in Australian taxation: beware the fine balance of social psychological and rule of law principles’ (2016) 31 *Australian Tax Forum* 63.

⁶ *Ibid* 81.

⁷ See further Christopher Decker and Matthew Harding, ‘Three Challenges in Charity Regulation: The Case of England and Wales’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 314.

- Legal structures (for example, that could most easily include NFPs that are corporations).
- Referral of state powers.
- The need for the ACNC to be given additional resources.
- The extent to which other regulatory schemes are in place, such as for trade unions, employer groups, political lobby or grass-roots activist organisations, and what should be harmonised, transferred or left in place.

16. It is important to use the lens of reducing red tape when planning to bring other types of NFPs under the ACNC's remit. As with the current scheme, it should remain a voluntary opt-in system.

The Corporations Act, Governance Standards and Misconduct

Interaction with the Corporations Act

17. The Committee recommends there is scope to simplify and reduce red tape in the interaction of compliance with *Corporations Act 2001* (Cth) (**CA**) and the Act. The Committee's submissions on this aspect are as follows:

- (a) **Omission of 'Limited' in company name:** The Committee recommends that sections 150 and 151 be removed from the CA and instead regulated by the ACNC. The use of 'Limited' in a name is no longer a useful indicator to the public of whether directors' fees are being paid. This information, if considered relevant to stakeholders of charities, could be disclosed in the Annual Information Statements (**AIS**) if the disclosure in the accounts was considered insufficient. All charitable entities should be treated the same way. This would also require some consequential amendments to the related party transactions provisions in the CA, removing the exemption for those companies to which ss 150 and 151 apply.
- (b) **Registration of companies:** The Committee recommends that only one form be required to register a charitable company to remove the duplication of process and information in first completing the Australian Securities and Investment Commission (**ASIC**) form and then the ACNC form, in much the same way the income tax exemption and DGR application forms have been merged into the ACNC application.
- (c) **Notification of company changes:** The Committee recommends that the requirement to notify ASIC of a change of name be removed. The ASIC register is not maintained as up-to-date. Full responsibility for the register for companies which are charities should be transferred to the ACNC and, to avoid ongoing confusion, the ASIC register entries for ACNC-registered charities should be removed and replaced with a link to the ACNC.
- (d) **Clarify ASIC and ACNC respective regulatory powers:** The Committee recommends that the following be clarified:
 - (i) Where a company is registered with the ACNC within 12 months of registering as a company with ASIC it has no reporting requirements to ASIC.

- (ii) Whether the ACNC should have the powers in ss 250PAA and 250PAB, given that ACNC-registered charities are not required to hold AGMs.
- (iii) The overlap of regulatory powers when a charity becomes insolvent.

18. The Committee also recommends some technical amendments are made to improve the interaction between the CA and the Act, as follows:

- (a) **Reliance on the register:** The Committee recommends that the Act provides the public with the ability to rely on the information in the register as in ss 128 and 129 of the CA.
- (b) **Address for service:** The Committee recommends that the CA requirements for a registered address for service for the company, the directors and the secretary are transferred to the ACNC and the ACNC is able to share data via the charity passport. This will enable the number of sections in CA which refer to the registered address to continue to be operative and effective, for example:
 - (i) The requirement to maintain company registers including the register of members at the registered office or principal place of business.
 - (ii) Recording details on the ACNC Register of who holds the role of secretary of the NFP (which could start with company secretaries) along the requirement for a company secretary to ensure compliance with registered office requirements.
- (c) **Special resolution:** The Committee notes that the definition of 'special resolution' in the CA refers to a provision which has been 'switched off' for ACNC-registered charities. The Committee recommends that a definition of 'special resolution' be included in the Act.
- (d) **Prohibitions on insurance:** Section 199B of the CA prohibits a company from obtaining insurance for its officers for conduct arising out of a breach of ss 182 (directors' duty relating to misuse of position) and 183 (directors' duty relating to misuse of information). However, ss 182 and 183 are 'switched off' for ACNC-registered charities. Accordingly, it would appear that the prohibition on obtaining insurance for improper use of information or position seems to no longer apply. The Committee queries whether this is an unintended consequence, and if so, suggests that it is remedied.
- (e) **Resolutions of sole member companies:** Section 249B of the CA provides that a company that has only one member may pass a resolution by the member recording it and signing the record. Section 249B of the CA has been 'switched off' for ACNC-registered charities. The Committee recommends that it is reinstated, or alternatively, that an equivalent provision be inserted in the Act.
- (f) **Minutes:** Section 251A of the CA imposes certain obligations on companies regarding the keeping of minutes of meetings and resolutions without meetings. That provision has been 'switched off'. The Committee recommends that the requirements of s 251A of the CA be re-instated, or that an equivalent requirement be inserted in the Act in s 55-5(2).

- (g) **Appointment of auditor:** The Committee recommends that ss 327A and 327B of the CA (Appointment of auditors) be amended to reflect where an auditor is not required.

The Governance Standards

19. The Committee acknowledges the difficulties described by Ian Ramsay and Miranda Webster in their article *Registered charities and governance standard 5: An evaluation*.⁸ It is the view of the Committee that minor technical, but not substantial, change is required at this time to address those issues. The Committee recommends:
- (a) That the Governance Standards be retained in their current form, save for the amendment of one word (discussed below).
 - (b) That ss 180-183, and 191 (directors' duties and disclosure of interests) contained in the CA be 'switched on' again. This will provide greater ability for members of a charity to bring an action to address inappropriate conduct by its responsible entities. It would also have the effect of ensuring that 'officers' as defined in the CA (who may not otherwise qualify as 'responsible entities' under the Act) are subjected to appropriate duties. It ought to be made clear that this is not intended to transfer regulation of charities back to ASIC.
 - (c) That the word 'perceived' be deleted from Governance Standard 5. This would bring greater clarity to the content of Governance Standard 5 by avoiding the use of a term whose meaning is not clearly established in law and which is capable of varied interpretation.
20. The Committee submits that there are still a range of equitable (including fiduciary) duties that apply to trustees, directors and managers of charities and other 'responsible entities' as defined in the Act. In many respects, the equitable duties existing at general law are more onerous than the minimum standards included in the Governance Standards. The Committee recommends that the ACNC consider providing more educational material to charities and their responsible entities that explain these duties and their interaction with the Governance Standards.

Enforcement Powers

21. Under Division 100 of the Act, the ACNC Commissioner is conferred with the ability to suspend or remove a 'responsible entity' (Subdivision 100-D). A 'responsible entity' is defined to include a director of a company or a person who performs those functions, a member of a committee of management of an association, and a trustee (s 205.30, s 300.5 of the Act). In effect, these are the persons comprising the governing body of an organisation, whether incorporated or not.
22. Where the ACNC Commissioner removes a responsible entity under s 100.25, the ACNC Commissioner is able to appoint another person ('acting responsible entity') in his or her place (Subdivision 100-C). This appointment has the following effect:
- The acting responsible entity is granted 'all the rights, title and powers, and must perform all the functions and duties' of the person's removed or suspended (s 100.55 of the Act).

⁸ Ian Ramsay and Miranda Webster, 'Registered charities and governance standard 5: An evaluation' (2017) 45 *Australian Business Law Review* 127.

- The ACNC Commissioner is empowered to issue directions and require the acting responsible entity to do (or not do) one or more specific things (s 100.60 of the Act).
23. The Committee recommends that a right to judicial review be included in Subdivision 100-C to enable a charity to challenge a decision of the ACNC Commissioner to appoint a responsible entity.
24. The Committee also recommends that a right to judicial review exercisable by the charity be included in Subdivision 100-B. At present, the right to object is conferred only on the person removed, not the charity itself (ss 100.10(10) and 100.15(7) of the Act).

Protection of Charitable assets

25. The Committee is conscious that there are difficulties inherent in a federation that arise from limitation of Commonwealth regulatory powers and that these have a bearing on the scope of ACNC regulatory powers. The Committee has some experience of instances (albeit rare) where individuals have sought to gain for themselves inappropriate private benefit. While the ACNC may revoke registration, that falls short of enabling it to take positive steps to ensure that property continues to be applied for charitable purposes. Other ACNC measures are limited to Federally Regulated Entities.
26. The Committee has referred earlier in this submission to its view that a range of equitable (including fiduciary) duties apply in addition to the Governance Standards and recommends:
- (a) The ACNC is tasked with a function of making recommendations to the Minister on changes that ought to be made to the Act, or an agenda for state law harmonisation or referral of powers, that would enable protection of charitable assets while ensuring the nature of the ACNC as a voluntary regime continues.
 - (b) The ACNC is conferred with the ability to bring an action in Court seeking any appropriate equitable remedy, if sanctioned by the Attorney General of a State, or in the case of a charity being in a Territory, of its own motion.

Interaction with the Charities Act 2013

The *Charities Act 2013* (Cth) (**Charities Act**) is a fundamental aspect of the regulatory framework administered by the ACNC. Hence, the Committee has included comments on it in this submission.

Meaning of 'Not-for-Profit'

27. In its submission to this Review, the ACNC raises for consideration whether a statutory definition of 'not-for-profit' might be adopted for the purposes of the Charities Act and the Act (Recommendation 3, ACNC Submission).
28. The Committee agrees that there is value in adopting a definition, but is mindful that numerous, unsuccessful attempts have been made in the past.
29. The Committee makes the following submissions in relation to a statutory definition:

- (a) The organising idea for any statutory definition ought to be *purpose*, as it always is in charity and NFP law. That is, a good definition that coheres with charity law and NFP law as a whole would specify that a NFP entity is an entity whose primary purpose is not to generate profit or gain for any private entity while operating or on winding up. Indeed, the Productivity Commission's definition of NFP included a requirement that the NFP have a community purpose ('organisations established for a community purpose, whether altruistic or mutual in nature')⁹ and we consider that this is sufficiently broad to capture member-serving NFPs. The presence of a non-distribution constraint (on residual profits¹⁰ or capital) could then be good evidence that there is no private profit purpose; and more complex arrangements would fall to be considered on a case by case basis.
- (b) A statutory definition ought to be able to deal with the following types of entities that presently exist within the NFP Sector:
 - (i) Industry associations, trade unions and employer groups, particularly if the remit of the ACNC is to be expanded to cover the whole NFP Sector.
 - (ii) Charities that provide benefits to their members because of the poverty or other specific need of their members, where the meeting of such a need qualifies as a charitable purpose.
 - (iii) Self-help groups.
- (c) Any statutory definition ought to be able to accommodate the existing common law concept of NFP entity including dealing with social enterprises, and arrangements that involve charitable or other NFP entities participating in social impact bonds or establishing for-profit arms as part of their purpose (such as where profits are distributed to charitable holding entities).
- (d) Any definition ought to assist and not stifle the development of the law in this area. Innovation within the NFP Sector is to be encouraged and doing so is one of the ACNC's Objects.
- (e) Any extension to NFPs should also take account of the distinctions between charities and other NFPs, in particular that charities are other-regarding, while NFPs may be member-serving.

Meaning of 'government entity'

30. The Committee agrees with the following statement in the ACNC Submission regarding the definition of 'government entity' in s 4(1) of the Charities Act (paragraph 10.6):

'The definition does not reflect the relevant common law principles in this area. The ACNC has found the definition difficult to interpret and apply in practice. This lack of certainty has significant implications for entities created by or under statute that seek to determine whether they are entitled to charity registration.'

⁹ Productivity Commission, *Contribution of the Not-for-profit Sector* (Research Report, 11 February 2010) xxv, 3-8.

¹⁰ That is, amounts remaining after discharge of proper expenses of liabilities incurred in the pursuit of the purpose.

31. The Committee also submits that the case law dealing with the meaning of ‘government entity’ is equally obscure, and that there is no simple test to discern when an organisation is part of government and when it is not. The Committee draws to the attention of the Panel the following article on this point: Matthew Harding, *Distinguishing Government from Charity in Australian Law*.¹¹
32. In the present circumstances, the Committee considers the preferable approach is to remove the statutory definition and allow the common law to develop and be applied as circumstances require.

Disqualifying purpose – Emphasis on activities

33. Section 11 of the Charities Act sets out what constitutes a disqualifying purpose. In paragraph (a), it includes ‘the purpose of engaging in, or promoting, *activities* that are unlawful or contrary to public policy’ (emphasis added).
34. The Charities Act was intended to codify the common law meaning of charity that existed before it.¹² Under the common law, an activity is attributed with certain characteristics (charitable or not) depending on the purpose for which it is undertaken. An activity does not have a meaning or character independent of the purpose for which it is undertaken.¹³
35. The wording of section 11 of the Charities Act invites confusion as it refers to the *purpose* of engaging in *activities* that are unlawful or contrary to public policy. The Committee recommends that the provision is clarified to provide that a disqualifying purpose is a *purpose* which is unlawful or contrary to public policy. If an organisation is regularly engaging in activities that are unlawful or contrary to public policy, this will be an indicator of such a purpose, but the focus ought to remain directed to purpose.

Transparency and Secrecy

The Public register

Question 5: Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?

36. The ACNC maintains a publicly searchable register of registered charities and their responsible persons on its website. The views of the Committee are diverse in relation to the issue of whether additional information ought to be included on the register. This is no doubt similar to the diversity of views within the NFP Sector itself. It is within this context that the Committee offers the following comments:
- (a) The level of transparency required of a charity should be proportional to its size. This is an appropriate way to balance the objectives of maintaining public trust and confidence as well as reducing red tape.

¹¹ Matthew Harding, *Distinguishing Government from Charity in Australian Law* (2009) 31 *Sydney Law Review* 559.

¹² See *Charities Act 2013* (Cth), Preamble.

¹³ See, eg, the discussion in the majority judgement in *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55. See, in particular, the discussion regarding activities at [26] and [38].

- (b) Before any additional information is added, consideration should be given to what evidence there is that the public desires further information, particularly if requiring additional information would place a burden on smaller charities.
- (c) Ongoing improvements to the way that data is presented is to be encouraged, taking care to ensure that any new requirements are carefully considered to ensure that the additional information facilitates meaningful comparisons on an 'apples with apples' basis.
- (d) Consideration should be given to including the following information, which would help establish the ACNC as a true 'one-stop-shop':
 - (i) The DGR status and category.
 - (ii) Business names.
 - (iii) Names and link to another register where the charity is reporting to for information.
 - (iv) A link to the charity's website.
 - (v) Information that would otherwise have historically been obtained by a search of the ASIC register (for companies), *mySchool* website (for schools), the Australian Council for International Development (**ACFID**) register (for overseas aid funds) and similar.
- (e) Consideration should be given to including the name and Australian Business Number (**ABN**) of private ancillary funds (**PAFs**), even when other information is withheld. This would enable confirmation that it is on the register and up to date with filings. The Committee notes that the name and charity registration is already available on the Australian Business Register (**ABR**) but there is no means to confirm the information on charity registration as the register is completely silent for these PAFs.
- (f) The object of supporting and sustaining a robust, vibrant, independent and innovative Australian NFP Sector should be borne in mind. The Committee is aware of some concern within the community about the potential for misuse of the register, to identify and personally target responsible entities of organisations with controversial political views. The Committee raises for consideration whether a requirement ought to be introduced that the information on the Register must only be used for a proper purpose. The Committee notes that there are provisions within the CA regarding use of information on companies' registers,¹⁴ and similarly within some State-level incorporated associations legislation.¹⁵

Withholding information

37. The circumstances in which information can be withheld from the Register are limited. They are set out in s 40.10 (emphasis added):

'40-10 Commissioner may withhold or remove information from Register

...

¹⁴ See, eg, *Corporations Act 2001* (Cth) s 177.

¹⁵ See, eg, *Associations Incorporation Reform Act 2012* (Vic) s 58.

*(2) The Commissioner may decline to include information on the Register, or may remove information from the Register, if the Commissioner considers that any of the following circumstances exist: (a) the information: (i) is commercially sensitive; **and** (ii) has the potential to cause detriment to the registered entity (or former registered entity) to which it relates, or to an individual...'*

38. The Committee recommends that the '**and**' in paragraph (a) be replaced with an '**or**'. It would enable the Commissioner, if the Commissioner sees fit, to exercise discretion to withhold information to protect a charity or an individual. An example of when this might arise could be when a rehabilitated drug addict serves on the board of a support group.

Investigations

39. The Committee is conscious that the ACNC is prohibited from providing information about investigations it conducts into registered charities due to secrecy provisions.
40. The Committee is conscious that publication of the fact that an investigation is ongoing has the potential to severely prejudice a charity's operations. It can have an adverse impact on a charity's relationship with donors, government, members and other stakeholders.
41. The Committee also recognises that there is a desire within the community to know the outcome of an investigation, to give the public confidence that the ACNC is performing its role and responding to complaints.
42. The Committee recommends careful consideration of other statutory regimes and public consultation prior to making any amendments in this area, so as to avoid any unintended consequences. Absent those considerations and further consultation, the Committee cannot support Recommendation 11 in the ACNC Submission.

Other Comments

Fundraising

Question 2: Are there gaps in the current regulatory framework that prevent the objects of the Act being met?

Question 8: What opportunities exist to further reduce regulatory burden?

43. The Law Council of Australia has endorsed the *#fixfundraising* campaign.¹⁶ The *#fixfundraising* campaign calls attention to the complex, burdensome and ineffective fundraising laws that exist throughout Australian States and Territories and proposes a solution. The solution comprises three simple steps:
- (a) Clarification and minor amendments to the Australian Consumer Law (**ACL**) to ensure application to fundraising activities is clear and broad.
 - (b) Repeal of fragmented State and Territory fundraising laws.

¹⁶ For further information see Not-for-profit Law, *#fixfundraising*, Justice Connect <<https://www.nfplaw.org.au/fundraisingreform>> .

- (c) Work with regulators and self-regulatory bodies to provide guidance to fundraisers to continue to improve fundraiser conduct.

44. The first step in the process is to ensure there is a robust regime to govern fundraising activities at Commonwealth level through the ACL. The ACL provides the ideal legal framework because of its focus on consumer protection and because the nature of the rules it promulgates are well suited to governing fundraising activities; for example, it contains a general rule against engaging in misleading or deceptive conduct. Ideally, some minor amendments would be made to the ACL to broaden and strengthen its application to fundraising,¹⁷ but it is accepted by the Committee and others who have endorsed the *#fixfundraising* campaign as the preferable substantive legal framework for addressing this issue.

45. Progress is underway with the three steps. The Australian Competition and Consumer Commission (**ACCC**) issued guidance in 2017 which makes it clear that the ACL does apply to fundraising and explains the extent to which it applies.¹⁸

46. It is the view of the Committee that the ACNC ought to assist the ACCC in applying and enforcing the ACL by:

- Sharing data via the charity passport. The Committee acknowledges and endorses Recommendations 13, 14 and 15 in the ACNC Submission to enable data sharing for this purpose. Data sharing would enable the ACNC to work with the ACNC in the same way that it does with other regulators, such as ASIC.
- Educating charities about their obligations under the ACL, and in particular, the obligations that it imposes on governing body members.
- Supporting best-practice among charities in this area, in furtherance of its Objects of supporting and sustaining the Sector and maintaining public trust and confidence.

47. The Committee also recommends the establishment of an advisory committee. Its purpose would be to consider and where agreed upon, facilitate the implementation of the following:

- Referral of any necessary or desirable legislative powers to the Commonwealth to ensure there is a robust national regime for regulating fundraising.
- The creation of a short, simple mandatory fundraising code to be contained within the ACL, which would supplement existing core provisions in the ACL, in exchange for States and Territories repealing their existing legislation and regulations on fundraising. It would need to address fundraising via face-to-face and telephone/text means, as this appears to be where most complaints derive from.
- Repeal of all licensing requirements. Reporting can be achieved through information in the AIS, and the questions in the AIS could be tailored to cover a broader range of issues, such as third-party fundraising, face-to-face fundraising and telephone fundraising.

¹⁷ See Not-for-Profit Law, Justice Connect, Submission to the Australian Consumer Law Review (27 May 2016) <<https://www.nfplaw.org.au/fundraising-reform-submissions>>, for its suggestions on how the ACL could be amended to better regulate fundraising activities.

¹⁸ Australian Competition and Consumer Commission, *A guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers* (December 2017) <<https://www.accc.gov.au/publications/guide-to-the-acl-for-charities-not-for-profits-fundraisers>>.

48. The advisory committee ought to be comprised of representatives from each of the States and the Territories, the Commonwealth, and ideally also the Not-for-profit Sector. The Committee recommends that it be chaired by a representative of a State.
49. Finally, to enable the ACNC to pursue its red tape reduction Object, and indeed its other Objects, the Committee recommends that the ACNC is conferred with the ability to make recommendations to the Minister on changes to the Act or Charities Act that could assist with harmonisation of laws and reduction of red tape.

Responsible persons

50. The Committee endorses recommendation 7 contained in the ACNC Submission regarding responsible persons.

Published reasons for key registration decisions

51. The Committee suggests that a bank of anonymised published reasons for key registration and non-registration decisions of the Commissioner will provide valuable guidance for the Sector.

Test case funding

52. When the ACNC took over supervision of charities from the ATO the test case funding that was available for charities to conduct litigation to clarify the law did not transfer across to the ACNC. The Committee recommends that the ACNC be provided with test case funding.

Binding rulings

53. When the ACNC took over supervision of charities from the ATO the capacity of the ATO to issue private and public binding rulings did not transfer to ACNC. The Committee recommends that the ACNC be provided with the ability to issue binding rulings. Some caution would likely be required about the duration of rulings, noting that tax rulings would typically have been granted for a number of income years for the relevant entity (when ruling about charity status) or about a particular transaction.
54. In addition, the Committee recommends that anonymised rulings be made publicly available, for instance by way of a register such as the ATO's private binding rulings register. This would improve transparency about the ACNC's regulatory practices.

Contact

55. For further comment or clarification on any of the matters raised in this submission please contact Jennifer Batrouney QC, Chair, Not-for-profit Legal Practice and Charities Committee on (T) 03 9225 8528 or at (E) Jennifer_batrouney@vicbar.com.au.