Governance Institute of Australia

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T +61 2 9223 5744 **F** +61 2 9232 7174
E info@governanceinstitute.com.au
Level 10, 5 Hunter Street, Sydney NSW 2000
GPO Box 1594, Sydney NSW 2001
W governanceinstitute.com.au

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

By email: economics.sen@aph.gov.au

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

Governance Institute of Australia is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our Members are all involved in governance, corporate administration and compliance with the Corporations Act 2001. Furthermore, many of our Members serve as officers of charities, or work for, or are involved with charities, many of which are companies limited by guarantee and various of which are entitled to tax concessions. As a result, they are also involved in the governance of charities and compliance with the Australian Charities and Not-for-profits Commission (ACNC).

Governance Institute of Australia (Governance Institute) is itself a charity operating in the legal form of a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

Our Members therefore bring extensive knowledge of administration, governance and regulatory frameworks in the charity sector to bear on our comments in this submission. We welcome the opportunity to provide feedback on the Australian Charities and Not-for-Profits Commission (Repeal) (No. 1) Bill 2014 (the Bill) and draw upon the experience and expertise of our Members in providing our response.

Executive summary

- Governance Institute does not support the repeal of the *ACNC Act 2012*.
- Our preference is to retain the ACNC, but importantly, we support retaining the features of the current regulatory framework for charities, regardless of the identity of the regulatory agency.
- Our support of the ACNC is based on its light-touch presence as a regulator, its effectiveness in lifting the accountability and governance standards of charities, and its success in providing significant education to the sector and providing the sector with visibility.
- The NFP sector includes benevolent NFPs, that is, charities. As of early 2014, ACNC has registered 60,000 charities (there are 600,000 organisations in the NFP sector in

total).[1] The sector makes an invaluable contribution to Australia's economy and social capital, yet the regulatory framework that was in place prior to the commencement in 2011[2] of the NFP regulatory reform process condemned the sector to a two-tiered regulatory system (state and territory-based incorporated association regulation and a federal company law regime) that was inefficient, costly and did not meet the needs of small or large charities and NFP organisations. That is, the charities and NFP sector was heavily but ineffectively regulated.

- There have been multiple reviews of the regulation and taxation of the NFP sector in Australia over the last 17 years, all of which have concluded that the regulation of the NFP sector would be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements.[3]
- In each review*, the sector itself called for the establishment of a dedicated regulator*.
- The Australian Taxation Office (ATO) is charged with administering taxation legislation —— one small part of an organisation's regulatory framework. It has expertise in the administration of tax legislation but none in directors' duties, governance frameworks and financial reporting. Moreover, it has a conflict of interest, as its charter is to collect tax revenue on behalf of the government and it therefore cannot assist charities seeking to register, as this constitutes the provision of advice on accessing tax concessions. It is an inappropriate regulator for the sector.
- While at first glance, ASIC could be considered as an appropriate, ASIC's focus is on 'for-profit' companies, with a regulatory framework based on the Corporations Act to ensure accountability for the deployment of investment. This is very different from the charity sector, where dividends, share buy-backs and many other concepts have no relevance. Members of charities are not driven by the bottom line but by a deep-rooted ethical mission. The charity sector requires a regulator that understands that charities are established to fulfil a 'mission' which is not that of generating profits for return to shareholders.
- The establishment of the ACNC was the first step in establishing a one-stop national regulatory framework for the sector and moving it away from the dual compliance regime where charities that are incorporated associations are subject to both state and federal regulation.
- Charities deserve to be granted the same national context as the private sector. National regulation of 'for-profit' companies through a referral of powers to establish the *Corporations Act 2001* (Cth) has been of immense economic benefit and value to Australia. There is no public policy argument to support the continuing imposition of dual regulation on charities when our private sector companies have already been freed of such onerous obligations for more than a decade.

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[1] Productivity Commission, *Contribution of the not-for profit sector*; 2010

[2] Department of Treasury, *Scoping study for a national not-for-profit regulator: consultation paper*, January 2011 was the first step in the reform process that unfolded over the following three years.

[3] These reviews include: the 1995 Industry Commission inquiry report *Charitable organisations in Australia*; the 2001 Committee for the Inquiry into the Definition of Charities and Related Organisations inquiry report *Report of the inquiry into the definition of charities and related organisations*; the 2008 Senate Economics References Committee's *Inquiry into the disclosure regimes for charities and not-for-profit organisations*; the 2010 *Review into Australia's future tax system*; the 2010 Productivity Commission's inquiry report *Contribution of the not-for profit sector*; the 2010 Senate Economics Legislation Committee's *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010;* the 2011 Senate Economics References Committee inquiry report *Investing for good*; *the development of a capital market for the not-for-profit sector in Australia*; the 2011 Treasury consultation paper *Scoping Study for a National NFP Regulator*; the 2011 Treasury consultation paper *A definition of charity*; the 2011 Treasury consultation paper *Better targeting of not-for-profit tax concessions*; The 2011 Treasury consultation paper on the *Review of not-for-profit governance arrangements;* the 2012 Australian Charities and Not-for-Profits Commission discussion paper *Australian Charities and Not-for-profits Commission: Implementation design*; the 2012 Treasury consultation on the *Australian Charities and Not-for-Profit Commission Bill 2012;* the Standing Committee on Economics inquiry on the *Australian Charities and Not-for-Profit Commission Bill 2012*; the Parliamentary Joint Committee on Corporations and Financial Services inquiry on the *Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*; the Senate Standing Committees on Community Affairs inquiry on the *Australian Charities and Not-for-profits Commission Bill 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*

- Harmonisation of state and territory regulation of incorporated associations has commenced and should be allowed to complete. If harmonisation continues to be progressed through the Council of Australian Governments (COAG), the dual compliance regime will cease and charities will finally be faced with only one set of compliance obligations.
- Returning regulation to the ATO and maintaining dual state/territory and federal regulation is regressive and imposes more onerous compliance obligations on charities than those regulating the private sector.
- Given the public nature of their purpose, and the tax concessions they receive, it is *entirely proper* that charities maintain proper financial records and accounts and provide transparency as to their governance arrangements. Accountability, transparency and stewardship should not be restricted to 'for-profit' companies.
- What must always be balanced is the reasonableness of compliance requirements with the need to ensure that stakeholders continue to have confidence in the governance of charities.
- The public consultation on all aspects of the regulatory framework for charities, conducted over a number of years by both Treasury, as well as the public consultation on the Annual Information Statement (AIS) by the ACNC, ensured significant stakeholder input and an appropriate balance between the information required to maintain public trust and confidence and a compliance impost.
- The ACNC reporting obligations are tiered according to the size of the organisation, that is, there are different reporting obligations for small, medium-size and large charities (just as there are tiered reporting obligations for private companies).
- The ACNC has been experienced by the sector as a light-touch regulator, with an emphasis on support and education.
- The requirement of information through the AIS populates the Charities Register, which is one of the most important features of the current regulatory system. It provides and promotes transparency and accountability by allowing all stakeholders who wish to donate, volunteer and be involved with charities easy access to information about the identity and operation of every charity and provides comparability. Those charities fulfilling their mission and with good governance arrangements in place welcome the transparency. If any charity does not wish information on it to be publicly available it must be asked why it wishes to avoid scrutiny and whether it should continue to be supported by stakeholders and tax concessions.
- National collection of data on the charities sector also ensures that, for the first time, its vital contribution to Australia can be recognised and policy decisions made about the sector can be properly informed and considered.

Recommendations

Governance Institute, along with the majority of the charity and NFP sector, has continuously supported the establishment of the ACNC as an independent NFP regulator.

Governance Institute recommends that support of the charities sector is best achieved by:

- retaining the ACNC and the features of the current regulatory system, which are tailored specifically to the needs of the charity sector — those features are:
    - the national collection by one body of basic, practical information from charities so that anyone can determine at a glance if the organisation is being managed well; that the financials are sound; the use of resources is aligned with the organisation's values and mission; and there are safeguards in place to ensure that the personal interests of the governing body do not override the interests of the charity
    - the population of that information in a national Charities Register to provide a free, online, credible, searchable database on charities

    - the provision of a wide range of educational resources for the charities sector on a publicly accessible website, not only so that those working for and involved in charities understand the importance of transparency of financial management and governance and accountability to stakeholders on these matters, but also to ensure that improvements in practice take place
    - a regulator that has a light-touch philosophy that stresses support of the sector to encourage improvement and uses direct intervention as a last resort
    - the capacity for the agency to take enforcement action if education fails, so that the public can maintain confidence in the sector

- not returning regulation of the sector to the ATO

- ensuring that the regulatory reform process commenced in 2011 is allowed to complete by progressing harmonisation of state and territory regulation or implementing a referral of powers through COAG, as has been done for the 'for profit' sector. This would remove the dead hand of the dual regulatory regime currently impeding the sector and grant it the same national context as was granted to the private sector more than a decade ago. This would also ensure that the regulatory agency dedicated to the sector is able to be a one-stop shop regulator, just as ASIC is a one-stop-shop regulator for the 'for profit' sector

- offering consistency of government funding agreements at both the state and Commonwealth level through the COAG process — this would greatly reduce the compliance obligations of charities, as much of the reporting burden suffered by the charities sector rests with inconsistent accountability and reporting requirements in relation to government funding

- commencing the process of harmonising fundraising regulation, which currently operates on a state and territory level, which means that charities seeking to raise funds nationally must comply with the differing requirements in each state and territory

- retaining the *Charities Act 2013* — the Act provides a statutory definition of charity that is broad and flexible, in alignment with the common law and it provides a common definition of the terms 'charity' and 'charitable purpose' as these terms are used across all Commonwealth legislation. This is very helpful, given that previously these same terms had different meanings depending on their use and definition in different legislation. In turn, this meant that many charities were required to seek expensive legal advice.

Notwithstanding the significant support for the ACNC from the sector, should the government decide to proceed with it plans to abolish the ACNC then Governance Institute recommends maintaining a dedicated function within an existing agency. This could be housed within another regulatory agency (but not the ATO). This would fulfil the promise of the multiple inquiries into the charities sector, all of which identified the need for a national regulator, and the frequently stated desire of the sector for a dedicated regulatory function. The sector itself has identified that it does not wish to retain a fragmented, dual regulatory regime and nor does it wish a return to the ATO as its national regulator.

Historic opportunity for the Australian Government to support charities as was done for the 'for-profit' sector more than a decade ago

Charities have participated in ongoing consultations concerning national regulation and the establishment of the ACNC over three years in good faith, with a view to those arrangements remaining in place for some time. Many charities are staffed or managed by volunteers, and

they addressed the issues canvassed in the multiple consultations on many aspects of the reform process as part of their extra-curricular responsibilities. Despite this drain on resources, their participation continued, because they believed in the aims of the reform process and were keen to be involved in how its objectives were implemented. Condemning the charities sector to a dismantling of the regulatory framework on which it has expended considerable time, effort and resources to ensure that it is fit for purpose is likely to be viewed by charities sector as a form of contempt for the sector.

Dismantling the current regulatory framework also condemns the sector to another round of reform at a time when charities are bedding down new systems and processes that they themselves acknowledge have brought significant benefits. For example, to meet registration with the ACNC, charities reviewed their constitutions, which provided various charities with the opportunity to identify if mission drift had occurred. Charities also reviewed their governance framework to ensure they met the governance standards, and as a result many have renewed their governance structures and processes, to the benefit of their members (if relevant), donors, volunteers and funding bodies.

There is no doubt that the process of regulatory reform was painful, as reform so often is. But confusing the process of reform with its outcomes (which have been beneficial) disadvantages the sector.

There is an historic opportunity to finalise the red tape reduction inherent in the regulatory reform process. The Australian Government has noted that it is of the view that the previous Labor Government did not make significant progress in achieving this, and was also unable to make progress in establishing information-sharing arrangements across Commonwealth departments. Governance Institute Members are of the view that the solution is not to halt or overturn the regulatory reform process that is sought by the sector itself and as has been recommended in multiple inquiries over more than a decade, but for the government to take leadership in bringing that reform process to a conclusion. This will result in charities being finally freed from the unnecessary work associated with inconsistent and multiple compliance frameworks with which it has been saddled due to historic circumstances.

It would be a credit to the Australian Government if it provided the charities sector with the degree of consistency and support offered to the ‘for-profit’ sector more than a decade ago when the states referred corporations power to the Commonwealth and the Corporations Act came into being. This can be achieved by the Australian Government providing leadership on reaching COAG agreement on harmonisation of regulation or a referral of powers. This should also incorporate fundraising legislation. This would see the dual compliance regime to which many charities are subject cease, and one regulatory framework put in place for all charities, bringing certainty to the sector and confidence in the sector for the public.

Consultation with stakeholders

Governance Institute notes that the Regulatory Impact Statement (RIS) on page 4 states that the Minister has consulted with ’a range of stakeholders’. We note that the current Senate inquiry constitutes the first opportunity for public consultation on the repeal of the ACNC. As there is no detail provided in the RIS as to how consultation has been undertaken by the Minister prior to the introduction of the Bill, Governance Institute is of the view that consultation to date appears inadequate, which raises doubts about the soundness of the public policy being proposed in the Bill.

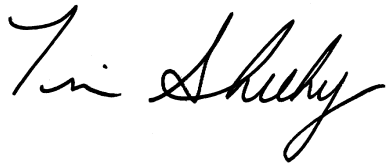
We also note that the Bill is the first stage in an intended two-stage process to repeal the ACNC Act and associated legislation. Reference is made in the Bill to an Australian Charities and Not-for-profits Commission (Repeal) (No.2) Bill 2014, which is to be introduced at some later date. Governance Institute Members are of the view that informed debate on the Bill that is currently

the subject of the Senate Committee's inquiry is extremely difficult to achieve, given that many of the issues the Bill gives rise to cannot be considered or adequately addressed without analysing the No. 2 Bill. This imposes significant 'red tape' on the sector and creates compliance uncertainty.

Governance Institute would welcome the opportunity to discuss any of our views in greater detail.

Our detailed comments on the repeal of the ACNC and our recommendations in relation to the Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 follow.

Yours sincerely



Tim Sheehy
Chief Executive

Why the regulatory reform process for charities was introduced

- The NFP sector makes an invaluable contribution to the economy — it accounts for nearly five per cent of GDP, growing at around eight per cent per year, and the sector is second only to the mining sector in terms of relative growth.[4]

- The sector also makes a significant contribution to Australia's social capital, through the provision of activities and services including health, social services, education, sport, arts, recreation and religious practices.

- It is a sector that deserves state and territory government action to remove all regulatory impediments to achieving the reform that will best assist it to deliver services to the community. The development of a coherent reporting framework is integral to reducing the red-tape burden with which many charities must contend and which requires them to expend effort on matters other than their 'mission'.

- Although corporate law reforms for the private sector have been introduced over the past decade or so, the optimal functioning of the charities and NFP sector is impeded by the current dual regulatory regime in Australia, with state and territory-based incorporated associations' legislation co-existing with the national regulation of companies. The system is inefficient, costly and does not meet the needs of either small or large charities.

- There have been multiple reviews of the regulation and taxation of the NFP sector in Australia over the last 17 years, all of which have concluded that the regulation of the NFP sector would be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements.

- In each review*, the sector itself called for the establishment of a dedicated regulator*.

- The reviews clarified that the ATO is not appropriate as the regulator for the sector. The ATO is set up for purposes other than to regulate companies (its purpose is to administer taxation legislation, which is only one part of any organisation's regulatory framework). The ATO is an inappropriate regulator of the charities and NFP sector, given its expertise is in one aspect of company regulation alone. The historical circumstances that have held the ATO responsible for determining, under taxation legislation, if an organisation satisfies the definition of not-for-profit are insufficient reason to return regulation of the sector to the ATO. The charity and NFP sector deserves to be regulated by a body with expertise in directors' duties, governance frameworks, and financial reporting obligations, both from an educational and compliance perspective, rather than by one with expertise in administering taxation legislation. Moreover, the charter of the ATO is to collect revenue on behalf of the Australian Government — this means it has a conflict of interest when dealing with charities, as it cannot provide advice on how to register charities, as this would see it providing advice on how to seek tax concessions. The ATO is best placed to administer the taxation system based on tax status decisions made by a dedicated regulator, whether that be the ACNC or another regulatory agency with expertise in directors' duties, governance frameworks and financial reporting obligations.

[4] The Australian Government, the Treasury, *Australian Charities and Not-for-profits Commission Taskforce: Implementation Report*, p2, June 2012 from http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=publications/implementationreport/html/index.htm

Benefits of ACNC and current regulatory framework

The RIS makes no mention of the benefits that have attached to the establishment of a dedicated, national regulator for charities. Those benefits are:

- The national collection by one body of basic, practical information from charities provides stakeholders (donors, volunteers, funding bodies, governments, taxpayers) with the opportunity to determine at a glance if the organisation is being managed well; that the financials are sound; the use of resources is aligned with the organisation's values and mission; and there are safeguards in place to ensure that the personal interests of the governing body do not override the interests of the charity.

- The population of that information housed on a national Charities Register provides a free, online, credible, searchable database on charities. We note that the integrity of the data on the Charities Register arises due to the regulatory function of the ACNC, that is, it can compel charities to provide this information.

- The provision of a wide range of educational and support resources for the charity sector on the ACNC's publicly accessible website assists charities to put in place sound accountability mechanisms, and visible reporting to donors and volunteers and funding bodies as to the stewardship of the charity and the fulfilment of its mission.

- The ACNC has proved to be a light-touch regulator — it stresses support of the sector to encourage improvement and uses direct intervention as a last resort. However, public trust is maintained by the capacity of the regulatory agency to take enforcement action if education fails.

- Many charities are under-resourced and have difficulty in understanding and complying with the provisions covering the assessment, granting and monitoring of concessional tax treatment. Therefore national registration, reporting obligations and governance requirements through the ACNC streamline and simplify the compliance process, in turn improving understanding, reducing dependence on expensive legal advisers and consultants and reducing compliance costs.

- National regulation provides the additional benefit of the collection of ongoing data on the sector based on charities' registration. Prior to the commencement of the ACNC, it was extremely difficult to collate data on charities, and it remains difficult to collect data on the entire NFP sector, to assess its growth as well as its extent and contribution. This hinders a true understanding of the vital importance of charities and the NFP sector as a whole to the Australian economy and society.

- The ATO did not collect this data, and given it has no expertise in directors' duties, governance frameworks and financial reporting, it is not in a position to do so. Without collection of this data on the sector, the sector will remain largely invisible to the nation and its invaluable contribution will continue to be largely unrecognised. This condemns charities to continue to being treated as 'second class' citizens.

- National regulation also assists those who wish to interact with charities. Without access to all charities operating in a similar field, as is currently provided for on the Charities Register, Australians cannot make decisions easily as to which organisation they wish to connect to and be involved with and donate to. They cannot assess if the charities are being prudently managed, so that they can retain confidence that their donations and support are fostering and facilitating the 'mission' they wish to support. The Charities Register provides stakeholders with comparability, which is essential for those wishing to support the activities of the sector.

Could the functions of the ACNC be undertaken by another government agency?

- While ASIC could be considered as the appropriate regulator to house a dedicated regulatory unit with expertise in regulating charities, ASIC's focus is on 'for-profit' companies, with a regulatory framework based on the Corporations Act to ensure accountability for the deployment of investment. This is very different from the charity sector, where dividends, share buy-backs and many other concepts have no relevance.

- Members of charities are not driven by the bottom line but by a deep-rooted ethical mission. The charity sector requires a regulator that understands that charities are established to fulfil a 'mission' which is not that of generating profits for return to shareholders.

- Charities also require a regulator that has a strong educational function, to assist those in the sector to fulfil their mission by ensuring there is trust and confidence in the sector through transparency of stewardship, with accountability provided through financial reporting and disclosure of governance arrangements.

- For these reasons, ASIC would need to set up a dedicated unit with responsibility for charities regulation, as the current staff has no experience in this area. Funding would need to be provided to facilitate this.

- ASIC has expertise in collecting information from companies and ensuring compliance with directors' duties, governance frameworks and financial reporting. It has also been implementing over some years a new interface for access to the information held on 'for-profit' companies in Australia. It therefore has the capability of maintaining the Charities Register and the expertise to take enforcement action should education fail and misconduct continues. Such enforcement capacity is a matter of last resort but needed to maintain public confidence in the sector.

- However, the ACNC can exercise graduated regulatory powers, which are very different from those available to ASIC. This is part of the education first, enforcement last approach that is so welcomed by the sector. Legislation would be required to facilitate graduated regulatory powers for any dedicated unit established within ASIC to oversee charities.

The need to significantly reduce red tape

The aim of the regulatory reform process is to reduce red tape, *but this process must be allowed to complete in order for the efficiencies to be experienced*.

Governance Institute Members are of the view that it is disingenuous to propose that a dedicated regulator has added a compliance burden to charities when duplication of compliance remains in place at a state and territory level. It is the ongoing dual nature of the compliance that has added to the compliance burden. Importantly, maintaining state and territory regulation of the charities sector provides no economic benefit to the states and territories — some state governments have already indicated that they recognise the savings that will be experienced when regulation of the charities and NFP sector moves to a national regulator. South Australia and the ACT have already put in place harmonisation programs.

To this end, the ACNC Act has a legislative review period of five years, in recognition that five years is a reasonable timeframe within which to evaluate the outcomes and achievements of the ACNC, including assisting in the harmonisation of regulation. We are of the view that taking

a decision after 15 months that outcomes have not been achieved does not take account of the processes involved in finalising regulatory reform.

Furthermore, the role played by government agencies, which require individual reporting for the provision of funding, is not mentioned in the RIS, but constitutes one of the major compliance burdens for the sector. Charities that receive grants need to report to the funding body or grantor against a set of conditions attached to the grant. The charities usually need to show that they have fulfilled the conditions of the grant, or achieved a set of key performance indicators upon which the grant rests.

However, Governance Institute notes that each government department currently has different reporting requirements. This introduces an extraordinary level of complexity into the disclosure regime of charities. Such complexity does not assist either the delivery of services, given the allocation of scarce resources to fulfilling reporting obligations, or stakeholder information needs, as comparability is ineffective.

Moreover, significant expense can be incurred in the administration of the financial recording and reporting functions attached to the receipt of government or other donor grants. The more diverse and numerous the sources of funding, the greater is the amount of work required to account to donors and benefactors for the expenditure of those funds. This is not always a simple task and is generally very time-consuming. The employment of competent financial staff can be a considerable organisational cost. The cost of computer-based accounting systems must also be considered. It is usual that, where adequate accountability is not provided to the donors/benefactors, then those funds would need to be repaid. This is the case in most circumstances with government grants. Failure to report correctly can see not only a request for repayment but also discontinuance of future funding.

Government funding agreements, therefore, at both the state and Commonwealth level, need to be simplified and made consistent. The current lack of consistency continues to place an unreasonable financial reporting burden on charities, far in excess of the provision of information required on the AIS for registration purposes as a charity.

While it is essential, therefore, to recognise that there are roadblocks that need to be removed before the reduction of red tape inherent in the regulatory reform program is fulfilled, the reality is that the barriers to reducing red tape are to be found in ongoing dual state and territory regulation and within the reporting requirements of government agencies.

A dedicated regulatory agency is not the problem. Disbanding the ACNC will not provide the solution. When the remaining impediments to a reduced compliance burden are addressed, the reduced reporting obligations put in place by the ACNC will be experienced as the red tape reduction they constitute.

- For any regulatory reform of the charities and NFP sector to succeed, it is essential that the sector is granted the same national context as the private sector. There is no private sector company in Australia, no matter how small or local in its activities, that is required to meet the compliance requirements of a state-based regulator as well as those imposed by ASIC — this has been the case since the commencement of the Corporations Act in 2001. For example, even a small milk bar servicing a local community incorporated as a proprietary limited company with a sole director is regulated by ASIC, and information about that company is held on the ASIC register of companies. That milk bar does not have to fulfil any state or territory compliance obligations.

- The states should not retain any residual role in regulating incorporated associations in the long run, and certainly not in regulating charities that are also incorporated

associations in the short-term. The states have not retained a role in regulating private companies since 2001 and national regulation of the private sector has been of immense economic benefit and value to Australia. Advances in technology have facilitated the establishment of a national regulator. Online interaction means that state-based offices are not required, as in the past, to facilitate registration of entities and lodgement of reports.

- The choice of the structure of a company limited by guarantee by charities (as opposed to an incorporated association) is usually based on the organisation being a national or multi-state organisation. Also, the choice is often because the charity wishes to show that it has in place good governance arrangements. Technology also facilitates a national presence in terms of access to donors even if the mission is locally-based. The scale of trading activities, which is an area of debate and variation in the state and territory-based associations' regime, also makes the company limited by guarantee structure attractive. Charities perceive that many of the state regulators are under-resourced and cannot cope easily with organisations that want to have variations to the prescribed model rules. The move to national regulation of all charities meets the needs of charities on many fronts, as well as providing transparency into the sector.

- There is no public policy argument to support the imposition of dual state and territory regulation on charities when our private sector companies have already been freed of such onerous obligations for more than a decade.

- Maintaining dual regulation would be regressive, and condemn charities to continue being subject to a greater compliance burden than the private sector, which currently has recourse to a 'one-stop-shop' national regulator.

- A fundamental aspect of the reform process should be for the states to agree on harmonisation of regulation or to refer powers to the Commonwealth, as occurred with the Corporations Act, to provide for all incorporated associations to be regulated nationally. This will ensure that charities have to respond to only one set of compliance obligations that operate nationally. This will bring savings to the states and remove all uncertainty, confusion and duplication in any regulatory reform affecting the charities sector.

- Indeed, South Australia and the ACT have already agreed to accept the ACNC reports and 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.

- Government funding agreements at both the state and Commonwealth level also need to be simplified and made consistent. The current lack of consistency places an onerous financial reporting obligation on charities. Government action can reduce the compliance burden by streamlining and standardising government funding agreements.

- COAG has already commissioned a *Regulatory Impact Assessment of potential duplication of governance and reporting standards for charities* (RIA) on how best to achieve national regulation.

- All governments in Australia have an opportunity to support the charities and NFP sector by agreeing to (a) harmonisation of regulation or a referral of powers and (b) consistency on accountability and reporting requirements in relation to government funding. The latter also needs to include directing government agencies not to collect

information from charities that has already been collected by the dedicated regulatory agency, but to collect it from the national regulator.

The reporting obligations attached to compliance with the ACNC are not onerous

Charities have a multiplicity of often complex stakeholder relations to consider (for example, members, volunteers and grant makers — government, private foundations, corporate, the general public). Members and stakeholders of all charities should be able to have access to a report that allows them to know the financial position of the organisation, that the organisation is being managed prudently, and that the allocation of resources is aligned with the values and mission of the organisation as set out in its constitution, as well as who constitutes the governing body and what processes are in place to ensure that the personal interests of directors do not override the interests of the organisation.

The current 'for-profit' legal and regulatory framework is designed to facilitate shareholder management and to assist investors to examine the accounts to ascertain the deployment of and return on their investment and does not assist the information needs of stakeholders in the charity sector. Furthermore, many charities are under-resourced and have difficulty in understanding and complying with the provisions covering the assessment, granting and monitoring of concessional tax treatment. Therefore national registration, reporting obligations and governance requirements streamline and simplify the compliance process, in turn improving understanding, reducing dependence on expensive legal advisers and consultants and reducing compliance costs.

Given the public nature of their purpose and the tax concessions they receive, *it is entirely proper* that charities maintain proper financial records and accounts and provide transparency as to their governance arrangements (with reporting requirements tiered according to the size of the charity). Whether a board is driven by the bottom line or by a deep-rooted ethical mission, our Members believe that it remains the board's (or management committee's) collective responsibility to ensure that the organisation is fit for purpose and provide strategic direction to enable it to attain its stated goals. It is also the board's (or management committee's) responsibility to report to stakeholders and provide accountability and transparency as to its stewardship.

For example, even a small local sporting club for children under 12 who play football should be able to report and disclose on these matters. Their report could disclose the people who sit on the management committee; the raising of $6,000 through sausage sizzles, trivia nights and raffles; and the expenditure of $5,000 on new balls and netting. Stakeholders should know if anyone on the management committee was involved in related party transactions. It may be that someone on the management committee runs a sporting goods shop and the balls and netting were purchased there. Moreover, a discount might have been offered, which was to the club's advantage, but the fact of the related party transaction should be disclosed. Risk management issues can also be disclosed, such as the fact that the management committee has taken out insurance to protect against liability in the event of injury. None of this reporting is onerous, but it is essential. Disclosures of who is making the decisions; money in and money out; and whether there are risk mitigation strategies in place should be made publicly available for all charities, no matter their size, given their public purpose and the tax concessions they attract.

- The provision of information on the AIS provides this information — it populates the Charities Register.

- From a governance perspective, our Members believe that it cannot be argued that charities should not have responsibilities in relation to transparency and accountability to stakeholders and should be exempt from such disclosures.

- The ACNC undertook extensive consultation on what information should be requested on the AIS, and the final form reflects both the views of charities and their stakeholders.

- The information provided on the AIS is publicly available on the ACNC website, thus ensuring that all stakeholders (including donors and volunteers) can access easily essential information about the charity. Funding agencies can also collect this information from the Charities Register.

- The AIS is a short-form report, with further disclosure and reporting required of some charities according to size. It is information that any charity should be able to collate readily and report easily. Importantly, the tiered reporting requirements (according to size of the organisation) means that small charities are not subject to the same reporting obligations as large and medium-sized charities, which have more resources and which deal in larger amounts of donor and government funds.

We note that the RIS states on page 2 that 21,000 unincorporated charities which were previously outside a regulatory framework are required to report to the ACNC, thus adding to the compliance burden. Governance Institute notes that this statement does not take into account that these charities are already subject to federal regulation which is fragmented and uncoordinated and that many will be required to comply with government funding acquittals. As noted earlier, such acquittals to government agencies constitute a significant part of the red tape burden for charities. The ACNC charity passport sought to streamline Commonwealth Government information requirements of such bodies with the ACNC 'charity passport', which in turn facilitates the Commonwealth Grant Guidelines. The Guidelines note that a government agency cannot seek information or financial reports from a charity that has already supplied it to the ACNC.

Educational role of a dedicated regulator

Governance Institute Members have long argued that a dedicated, national regulator of charities should have a broad role that includes registering charities; educating the sector and encouraging compliance; educating the public about the role of charities; and developing and maintaining an accessible, searchable public information portal.

Reducing the ACNC to a purely educational role, as recommended by the Australian Government with its suggestion of establishing a Centre of Excellence, excludes the equally important requirements attached to:

- applying consistent criteria to registration, which reduces the compliance burden for the sector
- compliance oversight that takes into account governance and financial reporting (essential to stakeholder needs)
- collecting information on the sector through registration, providing transparency to stakeholders who wish to engage with the sector and providing data on the sector
- educating the public about the sector and its invaluable role, which can only be done if the regulator can collect information on the sector.

None of these roles were undertaken by the ATO.

Moreover, we also note that a Centre of Excellence cannot compel charities to provide information in the same way a regulator can, which means the data integrity of the Charities Register will decline.

Governance Institute would see it as a failure of public policy if the remit of a national body for charities was reduced to education alone, with no powers granted to the body to ensure it can more broadly serve the needs of the sector and the Australian public wishing to engage with it. Such a curtailed role would be counter to the recommendations of the major reviews of the sector over many years and the clearly articulated needs that the sector itself has expressed.

The educational role of the ACNC is already recognised in its legislation and public documents (also subject to extensive public consultation). It is important for the sector that a dedicated regulatory agency be able to continue to fulfil these other roles as set out above, regardless of whether it is the ACNC or some other regulatory body.

Statutory definition of charity

A statutory definition of charity was recommended by an independent inquiry 12 years ago, with resounding support from the NFP sector. The *Charities Act 2013* took two years to develop and was the subject of extensive consultation, resulting in a number of changes over the course of its development. As a result, there was strong support for the Bill from the charities sector.

The Act provides a statutory definition of charity that is broad and flexible, and in alignment with the common law. The Act does not attempt to provide a wholesale codification of the common law position for all purposes, but rather provides a common definition of the terms 'charity' and 'charitable purpose' as these terms are used across all Commonwealth legislation.

This is very helpful, given that previously, these same terms had different meanings depending on their use and definition in different legislation. This was one of the main factors causing uncertainty and complexity in the sector.

While Governance Institute Members recognise that the repeal of the statutory definition of charity is not the subject of the current inquiry, we note that the government has also indicated its intent to repeal the Charities Act. Given that the Act was introduced to support the regulatory reform process — like the ACNC, it is but one element in the reform process — Governance Institute strongly supports retaining the statutory definition of charity.

Recommendations

Charities make a significant contribution not only to the Australian economy, but also to its social capital. It is a sector that deserves Commonwealth, state and territory government action to remove all regulatory impediments to achieving the reform that will best assist it to deliver services to the community.

Governance Institute strongly recommends that:

- a dedicated national regulator be maintained, regardless of whether it is the ACNC or sits inside another regulatory agency with expertise in directors' duties, governance frameworks and financial reporting obligations. We note our preference is that the ACNC be retained, given it meets all the criteria of a dedicated regulator as sought by the sector
- the current features of the regulatory framework be retained:
    - the national collection by one body of basic, practical information from charities so that anyone can determine at a glance if the organisation is being managed well; the financials are sound; the use of resources is aligned with the organisation's values and mission; and there are safeguards in place to ensure that the personal interests of the governing body do not override the interests of the charity

    - the population of that information in a national Charities Register to provide a free, online, credible, searchable database on charities
    - the provision of a wide range of educational resources for the charities sector on a publicly accessible website
    - the capacity for the agency to take enforcement action if education fails, so that the public can maintain confidence in the sector
- the current regulatory reform process be allowed to complete, with COAG progressing harmonisation of regulation
- the statutory definition of charity be retained.