



CATHOLIC HEALTH

Australia

16 July 2012

Committee Secretary
Standing Committee on Economics
House of Representatives
Parliament House
PO Box 6021
CANBERRA ACT 2600

by email economics.reps@aph.gov.au

Dear Secretary

Inquiry into the Australian Charities and Not-for-profits Commission (ACNC) Exposure Draft Bills

One in ten Australians in a hospital or aged care bed are cared for within a Catholic not-for-profit hospital or aged care service. Many more thousands of Australians are cared for in their own home by Catholic not-for-profit community care and home nursing services. Some forty thousand staff and many more volunteers work within these Catholic health and aged care services.

The *Australian Charities and Not-for-profits Commission Exposure Draft Bills* will not prohibit Catholic health and aged care services from being able to continue to fulfill their mission of service to the Australian community. That said, the *Bills* and the premise on which they are based are flawed. The effect of the *Bills* would be to add additional regulation to the operation of most not-for-profit most organisations.

Catholic hospitals and aged care governance is today mostly regulated by the *Corporations Act (Cth) 2001* or Association's law as prescribed by differing State or Territory Associations Acts. They are additionally regulated by their State and Commonwealth funding bodies or powers, safety and quality agencies, accreditation agencies, as well as being subject to appropriate public interest as providers of health and aged care services. The passage of the *Bills* would add yet another layer of government oversight on top of that already in place by way of the *Corporations Act (Cth) 2001* or Association's law. A strong rationale has not been provided as to why extra oversight might be needed beyond that already provided for in the *Corporations Act (Cth) 2001* and the Association's law.

Some of the key provisions contained within the *Bills* are similar in nature to existing requirements of the *Corporations Act (Cth) 2001* and Association's law; not-for-profit organisations are already required to register, are required to provide their financial accounts to regulators, and are subject to penalties for regulatory breaches.



Within this context, the *Bills* in their current form do not have Catholic Health Australia's support to the extent that they do not yet demonstrate how they will efficiently interact with the *Corporations Act (Cth) 2001* and Association's law.

Recognising this flaw in the *Bills*, there are four additional drafting flaws within the text of the *Bills* that require amendment. Amendments would need to ensure that:

1. The ACNC *Bill* gives **legitimacy of other funding streams** of not-for-profit organisations not currently recognised in the pre-amble of the *Bill*;
2. **Governance standards**, if required at all, are incorporated by way of enactment into the *Australian Charities and Not-for-profits Commission Act*, and not be left to be dealt with by way of regulation;
3. The intent of the new legal concept of "**Public trust and confidence**" is defined by the Parliament, to give certainty about the legislative intention of the test the Commission will apply in exercising Commission powers;
4. **Reporting compliance of not-for-profit organisations is not duplicated** by placing the burden on the ACNC to obtain reporting data from other regulatory bodies if the ACNC is not itself able to negotiate other regulatory bodies referring reporting functions to the ACNC.

Legitimacy of other funding streams

The preamble of the *ACNC Bill* at Section 5-5 states "*The not-for-profit sector is funded by donations from members of the public and by tax concessions, grants and other support from Australian governments.*" This phrase is only partially complete, and ignores circumstances where not-for-profit organisations are funded by way other methods such as:

- *fee-for-service*, where a consumer purchases a service such as home nursing from a not-for-profit health care provider, or where a patient through their private health insurance funds their treatment within a private hospital;
- *surpluses from commercial activities*, such as where a not-for-profit hospital or aged care service enters into a lease agreement with tenants to rent premises;
- *returns on investments*, where a not-for-profit institution has invested retained surpluses to create an income stream for future service delivery;
- *loans*, where a resident of a not-for-profit aged care service contributes a refundable deposit to enable the aged care provider to finance the provision of accommodation, or where a health service borrows to fund the construction of hospital premises.

Each of these funding methods are common within not-for-profit health and aged care services. They are as legitimate as are the four methods listed within Section 5-5. Ideally, the section would be amended to include reference to these four additional funding methods and allow for other methods of funding available or utilised by not-for-profit organisations.

Failing to incorporate into the preamble recognition of the legitimacy of all possible funding methods would leave the *Bill* incomplete.

Governance standards

Governance standards of not-for-profit organisations are currently determined by way of their enabling documents; a corporation is governed by way of the requirements of the *Corporations Act (Cth) 2001*, associations are governed by the differing State or Territory associations acts, trusts are governed by the law of trusts, and unincorporated associations are governed by way of their own determination.

After the passage of the legislation, Section 45-10(1) of the *ACNC Bill* would enable a Minister to promulgate a set of governance standards by way of regulation which would impact all entities registered with the ACNC. Three aspects arise as a consequence:

1. *Uncertainty as to what governance rules apply:* It is the intention of the Government to consult on the design of new governance standards for not-for-profit organisations. This commitment to consultation should enable interested not-for-profit organisations to contribute to the design of future governance rules. However, support of Catholic Health Australia and possibly many other organisations for passage of legislation to establish the ACNC is in part dependent on what new rules of governance might be agreed. It is difficult to provide committed support to the *ACNC Bill* when it is not clear what the full impact of it might be. In particular, section 45-10(2)(b) of the *ACNC Bill* would enable regulations to stipulate how a not-for-profit organisation is required to “act, or not act, in a specified manner.” Such a power is too broad. It gives rise to doubt about the possible reach of powers to be articulated by regulation; section 45-10(2)(b) should be revised.
2. *Ongoing lack of governance certainty:* With at least the governance requirements of corporations and associations currently prescribed by enactment, not-for-profit organisations are able to govern their affairs with certainty that requirements which could trigger deregistration cannot be changed without legislative change within a Parliament. In contrast, prescribing governance rules by regulation enables a Minister to change governance rules more often and with more ease. The possibility of regular change will give rise to governance uncertainty. For-profit listed or private companies governed by way of the *Corporations Act* would not likely approve of governance rules being articulated in anything but legislation. As many not-for-profit organisations are larger and perform more essential community services than some for-profit companies, there is no reason why not-for-profit organisations should settle for less certainty than their governance rules being articulated in legislation.
3. *Doubt as to why a new standard is needed at all:* Not-for-profit corporations and associations are currently governed by rules stipulated in their respective enabling legislation or founding documents. Corporation regulation in particular is, appropriately, onerous. It is not clear why new governance standards might be required for organisations who are subject to significant regulation, and nor is it obvious why smaller scale entities should be subject to similar governance requirements of larger entities. The case for new standards has not been made, and it may be that the ACNC would be best to focus on governance education rather than regulatory oversight of a set of rules which are as yet not known.

In the event that the Parliament proceeds with the intention for governance standards to be developed, the development should occur with a commitment for the standards to be incorporated into the future *ACNC Act*. This would require amendment of Section 45-10(1) of the *ACNC Bill* to enable for the later incorporation of governance standards into the *ACNC Act* at some point in the future.

“Public trust and confidence”

The *ACNC Bill* is premised on the view that only a regulator can guarantee *“public trust and confidence”* in not-for-profit organisations. Catholic Health Australia does not accept this premise. Not-for-profit organisations are independent of government, are self determining, and ultimately responsible for promoting *“public trust and confidence”* in themselves. Any role of a regulator should ideally be narrowly focused on ensuring management of taxpayer funds that not-for-profit organisations utilise by way of relevant tax concessions.

Section 35-10(2)(e) of the *ACNC Bill* enables the Commissioner to deregister a not-for-profit organisation if it is *“conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector.”* Neither the section nor the *Bill* defines the intent or legal meaning of the phrase *“public trust and confidence.”* In the absence of the Parliament stating clearly its intention, it would be for the courts to over time seek to define the application of these powers. Such uncertainty would give rise to doubt as to how not-for-profit organisations should conduct their affairs, give rise to uncertainty in the relationship of government and not-for-profit organisations, and create potential for expensive court intervention to define what the Parliament itself should define.

Ideally, the *ACNC Bill* should be amended to state that the basis of the regulator’s power is to oversee taxpayer contributions to not-for-profit organizations by way of tax concessions. If such an amendment cannot be agreed to, the *Bill* should alternatively be amended to sufficiently define what it is the Parliament means when it seeks to protect *“public trust and confidence.”*

Duplication of reporting requirements

Section 60-5(1) of the *ACNC Bill* requires not-for-profit organisations to provide annual reporting statements. It is understood in time that federally regulated entities may be able to provide information to the Commonwealth once; an example is the potential for corporations to report to the ACNC and forgo the need to duplicate by also reporting to the Australian Securities and Investment Commission. This potential for duplicative reporting to be avoided is welcomed, but the *ACNC Bill* has not been to date accompanied with details as to what changes to the *Corporations Act* might be needed to enable once only reporting to the Commonwealth for corporations.

It appears associations will be required to report to both the ACNC and their State and Territory association regulators. Many Catholic health services and aged care organisations are associations and will have to report twice to both the Commonwealth and their respective State and Territory regulator.

By the time of the passage of the *ACNC Bill*, ideally the Commonwealth will have either:

- Entered into agreement with the States and Territories for their not-for-profit regulatory functions to have been referred to the Commonwealth to enable the ACNC to become a genuine national regulator of all not-for-profit organisations;

- Entered into agreement with the States and Territories for their not-for-profit reporting functions to have been referred to the Commonwealth to enable the ACNC to genuinely be the sole reporting office for not-for-profit organisations; or
- Developed capacity for the ACNC to approach and obtain required reporting information from those bodies to whom not-for-profit organisations already report, placing the burden on the ACNC to obtain information it requires from arms of governments that not-for-profits have already provided information to, rather than placing the burden of reporting duplication on not-for-profit organisations themselves.

Being realistic, it would appear unlikely that any of these three propositions are able to be achieved by the time of the passage of the *ACNC Bill*. The likely consequence is that double reporting will become a reality of the operation of the ACNC. This duplication in reporting will not create a too an onerous burden for Catholic health and aged care services, and these services will be able to comply with this new duplicative process. Yet they should not need too, particularly given the stated intent of Commonwealth Government policy to reduce 'red tape' burdens on businesses and organisations.

Conclusion

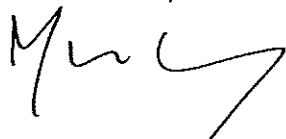
The premise on which the *Bills* are based is flawed. Not-for-profit organisations are already regulated by either the Corporations or Associations Laws, and it has not been made clear why a new regulator of these organisations needs to be given similar powers to those already held by established regulators of not-for-profit organisations.

The text of the *Bills* should be refined to 1) give legitimacy to all funding streams utilised by not-for-profit organisations, 2) to clarify that future governance rules, if needed, will be articulated in the *ACNC Act* and not by regulation, 3) give meaning to the intent of "*public trust and confidence*" powers, and 4) avoid duplication of activity reporting requirements.

Catholic Health Australia is a separate body to that of the Australian Catholic Bishops Conference, but we nonetheless endorse the submission that has been made to this Inquiry by the Bishops Conference. In particular, we recognise the concessions the *ACNC Bill* makes in relation to what has been termed "*basic religious charity*;" although we do not support the terminology "*basic religious charity*." This matter is expanded upon in the Bishops Commission submission.

Catholic Health Australia would welcome the opportunity to appear before a hearing of the Inquiry to both expand on the matters raised in this submission and to provide evidence to the Inquiry on additional matters expected to arise as those working in Catholic hospitals and aged care services consider further the detail of the consultation draft *Bills*.

Yours sincerely



Martin Laverty
Chief Executive Officer