WACOSS Submission to the Joint Inquiry into

The Australian Charities and Not-for-Profits Commission Bill 2012

wacoss

Western Australian
Council of Social Service Inc

Ways to make a difference

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About WACOSS

The Western Australian Council of Social Service (WACOSS) is the leading peak organisation for the community services sector, and represents 300 member organisations and individuals and over 800 organisations involved in the provision of services to individuals, families and children in the community.

WACOSS is part of a national network consisting of the State and Territory Councils of Social Service and the Australian Council of Social Service (ACOSS). Our national coverage strengthens our capacity to represent the interests of people in Western Australia across the breadth of state and national agendas.

Each year WACOSS member organisations deliver services to hundreds of thousands of Western Australians. The services we provide include health, community services and development, disability. Employment and training, aged and community care, family support, children and youth services, mental health and drug and alcohol treatment, indigenous affairs, support for culturally and linguistically diverse people, victims of violence and abuse, housing and advocacy.

We speak with and for Western Australians who use community services, to bring their voices and interests to the attention of government, decision makers, media and the wider community.

About this submission

The Council welcomes the opportunity to provide a submission to this inquiry.

Given the short time frame allowed for submissions we do not intend to present a comprehensive submission, or go into the details on the breadth of issues raised in the recent inquiry by the House of Representatives Standing Committee on Economics into the exposure draft of these Bills.

While the Council welcomes the improvements made to the exposure draft of the Bills prior to their introduction, in line with the views expressed by ACOSS and other representatives of the charitable sector, we remain concerned by a number of issues that were raised during the Economics Committee inquiry and had also been consistently raised by the sector in consultations over the discussion paper and previous exposure drafts, as are discussed below.

Our biggest issue of concern is the use of unqualified delegated instruments to address governance standards, external conduct standards and reporting requirements, as discussed further below. It is critical that these sections be amended to provide legislated qualifications as the limits to the powers to regulate the sector, and the process by which regulations are to be developed, reviewed and amended.

1. The timing and sequencing of reforms

The Council acknowledges the commitment of the Gillard Government to deliver a series of reforms concerning the charitable and not for profit sector, including a statutory definition of charity, reducing the administrative and reporting burden, and charities tax reforms within this term of Government. We also note that the community sector has consistently expressed concerns with the timing and sequencing of these reforms and the relative priority that has been placed on them within government.

It is inappropriate for such important and wide-ranging reforms to the governance and operations of the charitable and community sector to subject to an inadequate, time-constrained consultation process on the introduction of this legislation.

While we recognise that there has been in principle discussion of these reforms for many years and that the introduction of these Bills comes on the back of a significant number of inquiries and reports and years of sustained advocacy by the community sector, the ability to engage in substantive discussion of the details of the proposed measures to enact this shared commitment to reform has been extremely limited. We are particularly concerned that some of the most crucial measures are not dealt with in the legislative process but rather through delegated instruments that in the current draft bill do not provide any qualifications, limits or certainty around process.

The community sector has entered into the consultation process with the government on this series of reforms in good faith and has at all points sought to progress the agenda as inclusively and effectively as possible. We have been hampered in our efforts to do so by a selective approach to consultation by government, confidentiality requirements, delays in the presentation of discussion papers and exposure drafts, and a substantial disconnect between the policies and principles discussed and agreed with Ministers and the ACNC taskforce as compared to the substance and the significant over-reach of the measures presented within subsequent exposure drafts of the legislation.

While it is true the sector has been advocating for substantive reforms in these areas, the sequencing and priority assigned to the elements of the reform agenda clearly reflect the priorities and concerns of government and not the sector. Our biggest priorities are the reduction of the burden of onerous and inappropriate reporting requirements, together with clarifying and strengthening the manner in which charity is defined. We are not convinced that there is a pressing need to safeguard or strengthen public confidence in the charitable sector and note that all measures of public attitudes show substantially higher levels of trust in the charitable sector than they do for government, industry or the media.

Given the significance of these reforms, and the progress made so far, it is not only worthwhile, but vital that the delegated instruments for determining regulation under the Act include best practice legislated consultative practices.

2. Red-tape reduction

The Council notes that, while the Objects of the ACNC Bill now include the promotion of red tape reduction, we do not believe that the ACNC has the power or capacity to deliver any meaningful reductions to the administrative burden placed on the sector outside of the scope of its own

activities as a registrar of charities. The most significant portion of the administrative burden faced by the community sector is directly related to the funding and contracting practices and acquittal requirements of Government agencies (both at the Federal and State/Territory levels) – not to the regulation of charitable registration or sector governance. From the Council's perspective we have seen promising developments at a State level through development of whole-of-government contracting templates and procurement processes and a commitment to outcomes-based funding. We are very keen to see the Federal Government pursue these kinds of initiatives. To date we are aware of little progress on Commonwealth/State agreements on a common national approach and a single regulator of the charitable sector.

The Council supports the United Church's submission to the Committee in relation to its recommendation on furthering the reduction of red tape in accordance with the stated aim of the Government's not-for-profit reform agenda, namely:

> *The objects of the bill are amended to include a clear obligation on the government and its agencies to reduce the unnecessary duplicative and burdensome administrative reporting and compliance obligations on not-for-profits*.

3. Delegated instruments

The Council is extremely concerned that the Bill proposes to tackle some of the most complex, controversial and wide-reaching components of these reforms – those related to governance standards, external conduct standards and the requirements for financial reporting – by means of unqualified delegated instruments.

In particular, we are concerned:

- That the reliance on regulation means these measures may easily be changed by future Ministers without adequate consultation or public scrutiny;
- That the measures create significant powers that have the potential for substantial overreach;
- That the case for the necessity to regulate sector governance has not been made; and
- That this puts the not-for-profit sector at a competitive disadvantage where community services are competitively tendered with for-profit providers not subject to this form of regulatory burden.

The Council agrees with the concerns expressed by ACOSS where it says:

> " …(I)t is the governance standards upon which the regulators powers will turn that are one of the most important elements of this reform. The lack of certainty and clarity of safeguards in relation to their establishment and implementation remains the area of greatest concern among ACOSS members."

ACOSS then goes on to raise its concern with the "significant gulf between the policy intent as drafted and the sector's expectations of a principles-based, minimum standards model on good governance…" in the first exposure draft of the Bills as a reason why it believes that the ACNC should be established and empowered to undertake consultation with the sector to develop governance standards.

We agree with this approach, but remain concerned that other legislative measures need to be put in place to enshrine this consultative process and to protect the charitable sector, the philanthropic community who support them, and the disadvantaged and vulnerable people who rely on their support from the risk of inappropriate and arbitrary changes to the regulations in the future.

Irrespective of the sincerity of the commitment of the current government to the consultation and reform process and our trust in the current members of the ACNC, we are strongly of the opinion that, on balance, the risks of supporting the delegation of these powers to regulation are so great that, unless further safeguards are put in place, the dangers of creating these unchecked powers far outweigh their potential or short-term benefits.

On this basis we recommend that either:

1) The governance, external conduct standards and reporting requirements should be deferred from the current Bill to be addressed in subsequent legislation, or
2) Legislative safeguards are put in place to mandate a consultation process and to make these standards subsidiary legislation (as discussed below).

The Council notes that, when introducing the Bills, the Minister (Assistant Treasurer David Bradbury) made the following comments and gave the following commitment in his second reading speech:

> "The governance and external conduct standards, and the content of financial reports will be set out in statutory instruments. They will be developed through a consultation process that will include key stakeholders and advisory bodies, such as the NFP Sector Reform Council, and the public more broadly."

We welcome this commitment to an open and transparent consultative process to develop these regulations, and do not doubt it sincerity. Our concern is that, in spite of the commitment of the current Minister and current Government to consult on these regulations, measures created by regulation are just as easily overturned by regulation. There is nothing within the current legislation to bind future Ministers and future Governments to do the same and take the views of the public, the sector and other key stakeholders into account.

There is also nothing within the provisions of the proposed Bill that mandates consultation. Furthermore, there is nothing within *the Australian Charities and Not for profits Commission Bill 2012* (and, in particular, Chapter 3 Division 45) that limits the scope of those governance standards, despite the Minister's commitment to 'minimum standards' in his second reading speech. In fact, Section 45-10 specifies:

> **45-10 Regulations establishing governance standards**
>
> (1) The regulations may specify the ***governance standards***.
>
> (2) Without limiting the scope of subsection (1), those standards may require a registered entity to:
>
> (a) ensure that its governing rules provide for a specified matter; or
>
> (b) act, or not act, in a specified manner; or
>
> (c) establish and maintain processes for the purpose of ensuring specified matters.

This creates substantial scope for regulations to impose wide-reaching obligations on charitable organisations without limit.

There is also currently nothing in the Bills that outlines the principles on which these governance standards are to be based, despite the clear commitment in the Minister's second reading speech to *'principles-based governance standards'*. It would seem prudent and advisable to outline high-level principles for minimum governance standards in the legislation to ensure they are not potentially subject to arbitrary changes which could impose significant obligations on charitable organisations to change their governance and reporting arrangements.

Furthermore, there is nothing in the Bills that requires that these governance standards must be achieved through a transparent consultation process, despite the clear commitment of the Minister to such a process as quoted above. Finally, there is nothing in the Bills that puts in place safeguards surrounding future changes to those governance standards.

Given that the Minister is clearly committed to all of these things, but that there is legitimate grounds for the sector and the public to be concerned that future Ministers might not share such a commitment, there should be no reason why Government Members and Senators would not support amending the Bills to include provisions that mandate a consultative process to developing minimum principle-based governance standards.

There exist a number of precedents in both Federal and State legislation for mandating such an approach. The Council is most familiar with the manner in which this had been done in relation to public consultation and consumer representation in energy markets and consumer law. The ACOSS submission provides the examples of the National Consumer Credit Protection Act 2009 (including the National Credit Code as a schedule) and the Competition and Consumer Act 2010 (including the Australian Consumer Law and the Competition Code).

An excellent template is provided by the *Western Australian Electricity Industry Act (2004)* which includes the *Code of Conduct for Supply of Electricity to Small Use Customers* as subsidiary legislation. It legislates (in Part 6) the scope of the code, the requirement for public consultation on changes to the code, the establishment of a representative committee by the authority, and mandates regular public code reviews.

The Council has participated as one of a number of consumer representatives on the Electricity Code Consultative Committee a number of code reviews chaired by the WA Economic Regulation Authority, a process which has included opportunities for public comment and submission on public drafts of proposed changes to the code.

Recommendations

1) **That the governance standards, external conduct standards and reporting requirements should be deferred from the current Bill to be addressed in subsequent legislation,**
   OR
2) **That legislative safeguards are put in place to mandate a consultation process and to make these standards subsidiary legislation to the *ACNC Bill.***

The relevant section of the *WA Electricity Industry Act 2004* is provided as an appendix below. The Council is looking at how these measures could be adapted to be put forward as amendments to the ACNC Bill, and is happy to consult with the Committee further on these matters, or to provide draft amendments on request.

Appendix:

Part 6 of the *WA Electricity Industry Act 2004*

Part 6 of the *Electricity Industry Act 2004* specifies both the content and the process to develop and revise the *Code of Conduct for Supply of Electricity to Small Use Customers*.

Key elements of the code:

79. Code of conduct

(1) The Authority may, in consultation with the committee, approve a code of conduct under this section.

(2) The code of conduct is to regulate and control the conduct of —

(Specifying who the Code applies to)

80. Code is subsidiary legislation

The code of conduct is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

(Specifying that the code is subsidiary legislation, that is a schedule of the Act, not a regulation, and hence can only be altered as outlined by this Part 6 of the Act)

81. Consultative committee

(1) The Authority is to establish a committee to advise it on matters relating to the code of conduct.

(2) The Authority —

(a) is to determine the membership, constitution and procedures of the committee; and

(b) may discharge, alter, or reconstitute the committee.

(3) The Authority may determine that a member of the committee is to receive remuneration or an allowance, and if the Authority so determines it is to fix the remuneration or allowance on the recommendation of the Minister for Public Sector Management.

(4) Subject to this section, the committee may determine its own procedure.

(5) The Authority is to provide the committee with such support services as it may reasonably require.

(6) In the case of the initial code of conduct, this section has effect subject to Schedule 3 clause 2.

(Specifying the existence and role of the consultative committee)

86. Authority to monitor compliance

It is a function of the Authority to monitor and enforce compliance with the code of conduct.

87. Comment to be sought on amendment or replacement of code

(1) Whenever the Authority proposes to exercise the power —

(a) to amend the code of conduct; or

(b) to repeal and replace it,

the Authority must —

(c) refer the proposed amendment or replacement to the committee for its advice; and

(d) have regard to any advice given by the committee.

(2) Before the committee gives its advice to the Authority, it must, in accordance with section 89, give any interested person an opportunity to offer comments on the amendment or replacement.

(3) The committee must take into account any comments received under subsection (1) in formulating its advice.

(Specifying a transparent public process for any Code amendments)

88. Review of code

(1) The committee must carry out a review of the code of conduct as soon as is practicable after —

(a) the first anniversary of its commencement; and

(b) the expiry of each 2 yearly interval after that anniversary.

(2) The object of a review is to re-assess the suitability of the provisions of the code of conduct for the purposes of section 79(2).

(3) The committee must, in accordance with section 89, give any interested person an opportunity to offer comments relevant to the review.

(4) The committee must take into account any comments received under subsection (3) in carrying out the review.

(5) The committee must prepare a report based on the review and give it to the Authority.

(Specifying a regular public review process)