



**Australian Government  
Prime Minister's Community Business Partnership**

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

Dear Mr McClure,

Thank you for recently meeting with members of the Prime Minister's Community Business Partnership (the Partnership) to discuss the Review of Australian and Not-for-profits Commission (ACNC) legislation (the ACNC Legislation Review).

The Partnership is tasked by the Australian Government to explore strategies and incentives to increase giving, including reducing regulatory barriers and red tape around giving.

The Partnership reiterates its previous strong support for the role of the ACNC as regulator to ensure, build and maintain strong public trust and confidence in the Australian charitable sector. The ACNC should also continue to ensure adherence to appropriate governance standards and assist with the streamlining of cross jurisdiction legislation.

Attached is a copy of the Partnership's submission to the ACNC Legislation Review. Section one summarises those matters we recommend for consideration by the ACNC Legislation Review Panel, while section two provides our detailed responses to the terms of reference and focussed questions.

The main focus of the Partnership's submission includes:

- ensuring a fair and reasonable balance between an effective regulatory and compliance framework while preserving the sector's independence and its ability in delivering wide ranging services, education and support across Australia
- enhancing the role of the ACNC Advisory Board to engage and connect with the sector and provide advice to the Commissioner and the Minister
- the risks and benefits of extending the ACNC regulatory framework to other not-for-profit (NFP) organisations, especially for small (non-charity) NFP organisations and the need to harmonise/streamline with existing state/territory authorities
- the potential for ACNC overreach and tensions in being both the sector regulator while also facilitating capacity building and development, and
- further areas for red tape reduction for the sector, including a consistent national system of child safe standards and working with children checks, as recommended in the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Partnership would welcome the opportunity to provide its views on substantive issues identified by the ACNC Legislation Review Panel through future participation in roundtables and face-to-face consultations. We encourage the Panel to ensure these engagement platforms consider access for all stakeholders, including those in rural regional and remote Australia.

Yours sincerely



Alexandra Gartmann

7 March 2018



Peter Treseder AM

March 2018



**Australian Government**  
**Prime Minister's Community Business Partnership**

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Submission to the Review of Australian  
Charities and Not-for-profits Commission  
(ACNC) legislation from the Prime Minister's  
Community Business Partnership

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## Section 1:

### Summary of matters recommended for consideration by the Review Panel

1.	<p><b><i>Core principles and key values to ensure balance in the regulatory framework</i></b></p> <p>Consider that in shaping final recommendations to Government due attention be given to:</p> <ul style="list-style-type: none"><li>a) acknowledging and respecting the independence of the charity sector in underpinning its role in delivering wide ranging services and support across Australian society, in particular its support for the most vulnerable, and</li><li>b) the core regulatory principles and values of the ACNC, and the importance of retaining a fair and reasonable balance between regulation and sector independence and flexibility.</li></ul>
2.	<p><b><i>The role of the ACNC Advisory Board in engaging and connecting with the sector</i></b></p> <p>Consider reviewing sections (110-20 and 135-15) of the ACNC Act that limit the operation and effectiveness of the ACNC Advisory Board (the Board). Consider how the Board's role could be better articulated in the Act to enhance its advice to the Commissioner and to Minister, and having a broader representation at both a geographical and functional level, so as to:</p> <ul style="list-style-type: none"><li>a) enhance its ability to engage and connect with a highly diverse and evolving sector</li><li>b) build effective partnerships and alliances with sector peak bodies, research bodies and other relevant government advisory groups, such as the Partnership</li><li>c) ensure it has appropriate and balanced Board representation from the sector, donors and investors and government, and</li><li>d) enable it to deliver valuable insights and advice to the Commissioner and to the Minister, whether on request or self-initiated.</li></ul> <p>Consider whether the Board should be Ministerially appointed, but ensure all stakeholders views are reflected in its' membership and with some capacity to co-opt youth or Indigenous representatives or particular subject matter experts on a rotating or as needs basis.</p>
3.	<p><b><i>Object 1 – Legislative review and possible amendments</i></b></p> <p>Consider that while the Partnership is in broad agreement with the ACNC proposed amendments to the secrecy and disclosure provisions of the ACNC Act, this is with the following caveats:</p> <ul style="list-style-type: none"><li>a) the need to exercise caution making any amendments, in order to protect the privacy rights of charities (and their board members, staff, volunteers and donors) by the ACNC undertaking consultation with the sector and appropriate bodies such as the Office of the Australian Information Commissioner, and</li><li>b) any amendments are made having due regard to the core regulatory principles and key values espoused in the <i>ACNC Regulatory Approach Statement</i>.</li></ul>
4.	<p><b><i>Object 1 – Extending the ACNC regulatory framework</i></b></p> <p>Consider that any extension of the ACNC regulatory framework beyond just registered charities to cover other classes of not-for-profits (NFPs) needs to:</p> <ul style="list-style-type: none"><li>a) be proportionate to the risks as well as the potential benefits:<ul style="list-style-type: none"><li>(i) many NFPs have no or only a minimal legal form, operate for the mutual benefit of members and are low risk in terms of likely breaches of public trust – would compliance costs outweigh expected benefits?</li></ul></li></ul>

	<p>(ii) whether the costs and risks associated with extension of the framework are proportionate to the actual or perceived problem(s) it seeks to address and the anticipated benefits for the sector, government and the public</p> <p>(iii) unintended effects or perverse consequences of extending the framework, such as additional compliance burden for a significant number of small incorporated NFPs which currently operate under minimal reporting requirements to state/territory authorities</p> <p>(iv) the sector is not homogenous, it is highly diverse which suggests a highly unequal distribution of effects and outcomes for charity and non-charity NFPs – large and small - across the entire sector</p> <p>(v) the possible pathways (and transitions) to extend appropriate levels of regulation to different classes of non-charity NFPs (such as Co-Ops and Mutuals)</p> <p>(vi) the need to harmonise or streamline ACNC regulatory reporting and reporting requirements of state/territory authorities (e.g. annual filing of returns and fees) for a large number of small incorporated NFPs</p> <p>(vii) a lack of effective sanctions or penalties the ACNC could exercise to ensure compliance from non-charity NFPs who come under the ACNC regulatory framework</p> <p>(viii) expanding the ACNC’s reach would require a commensurate increase in resources, arguably not a well-targeted use of government spending, and</p> <p>(ix) a massive expansion of ACNC responsibilities (i.e. from some 55,600 charities currently registered with the ACNC to up to 600,000 NFP organisations in Australia) would impinge on its ability to robustly regulate charities and to continue to give Australian donors confidence to maintain and increase philanthropy.</p> <p>b) consider a partial expansion of the ACNC regulatory framework to particular classes of NFPs, in particular those that attract tax concessions i.e. licensed clubs and/or larger NFPs and those that operate in multiple jurisdictions</p> <p>c) consider how/if non-charitable NFPs could be supported to greater levels of self-regulation through voluntary codes of conduct. This could both increase public trust and would be aligned to an empowered sector committed to determine its own future, build its capability, effectively manage its resources and drive innovation</p> <p>d) consider the current legal structures available to NFPs (including social enterprises), and whether Government reform in this area would provide NFPs with a more simplified, consistent and fit-for-purpose regulatory environment. There are, however, some categories of NFPs that may require exclusion from any blanket changes, such as the exclusion of Indigenous NFP organisations currently regulated by ORIC, and social enterprises that operate as for-profit business entities with a social purpose, and</p> <p>e) consider the current exemption of basic religious charities from complying with the ACNC’s governance standards and from providing annual financial reports, regardless of the amount of their annual revenue. A level playing field should operate in respect of all charities, without regard to the religion or beliefs of the NFP and its purpose. The Review Panel should review the current blanket exemption that applies to basic religious charities to ensure a fair and equitable regulatory treatment of charities across the sector.</p>
5.	<p><b><i>Object 1 – Behaviours of charities that erode public trust and confidence</i></b></p> <p>Consider the critical need for safe, ethical and effective use of private digital resources (e.g. digital donor data) for public benefit, and to maintain public trust and confidence. This may call for the creation of new approaches to governing and regulating digital assets and support and tools for the charitable sector.</p>

6.	<p><b><i>ACNC proposed additional object to enhance the accountability of NFP entities</i></b></p> <p>Consider whether the ACNC goal to enhance the accountability of the NFP entities to donors, beneficiaries and the public can be best achieved through appropriate education and guidance by the ACNC rather than through adding a new object in the principal Act.</p>
7.	<p><b><i>ACNC proposed additional object to promote the effective use of resources of NFP entities</i></b></p> <p>Consider the following issues in relation to the ACNC’s proposed additional object (ACNC Recommendation 2) to promote the effective use of the resources of NFP entities:</p> <ul style="list-style-type: none"> <li>a) the effective use of the resources of NFP entities goes well beyond the financial and embraces a diverse range of tangible and intangible resources for NFPs to manage, such as management of staff and volunteers and building and sustaining brand/reputation with the public</li> <li>b) this appears to fall outside of the scope of the ACNC’s primary regulatory role and could be seen as regulatory overreach. It is questionable whether the ACNC should divert its efforts from its primary regulatory role to pursue this issue, given the best use of resources is a matter for the judgment and capacity of NFP organisations, and best done by the sector itself and by other existing or new bodies, more clearly charged with a capacity-building and support role for the sector</li> <li>c) a more appropriate focus for the ACNC would be on the impacts that charities achieve in line with the ACNC twin goals of transparency and accountability to underpin public trust and confidence in the sector. For example, a role for the ACNC as a facilitator to encourage a greater focus in the sector on outcomes and impacts measurement and reporting, including via the ACNC Governance Standards for charities, and</li> <li>d) the ACNC could also use its position more strategically (and targeted) to facilitate and encourage a greater preventative and early intervention role with charities that are exhibiting early signs of financial and other institutional stress and risk.</li> </ul>
8.	<p><b><i>Object 2 – The role of the ACNC in sustaining the NFP sector</i></b></p> <p>Consider these issues concerning the original establishment of the ACNC and its role:</p> <ul style="list-style-type: none"> <li>a) the Productivity Commission (PC) in its 2010 report did not believe the regulator should have a role in sector development; rather the regulator’s responsibilities should, “be limited to those relating to registration and reporting associated with demonstrating compliance with the legal requirements that underpin public trust and confidence in the NFP sector”, and</li> <li>b) remarks from former ACNC Commissioner Susan Pascoe AM that: <ul style="list-style-type: none"> <li>(i) objects two and three were a late addition to the ACNC legislation, and they had a dramatic impact on the ACNC’s role as it needed to manage the tension between its keenness to engage with and support the sector, and its responsibility to supervise and regulate it</li> <li>(ii) it is unusual for a regulator to have a requirement to support the sustainability of the sector, and there are few models that do so within Australia or internationally, and</li> <li>(iii) the ACNC stretched its budget to ensure object 2 was not ignored, taking the view that it could best support the sustainability of the sector as a facilitator by building the evidence base and developing its data analysis capability, and sharing this with the sector.</li> </ul> </li> </ul>
9.	<p><b><i>Object 2 – The role of the ACNC in sustaining the NFP sector</i></b></p> <p>Consider the arguments for the ACNC regulatory role being separate from the capacity building role for the NFP sector contained in Object 2, which include:</p>

	<ul style="list-style-type: none"> <li>a) the need for the ACNC to avoid the actuality or the perception of ‘regulatory capture’ by the sector</li> <li>b) the sector should be directing its own development, and that too much involvement from Government can quash innovation,</li> <li>c) the evidence from overseas is that regulatory bodies for the charities sector maintain separation between their regulatory roles and sector development, and that being an effective regulator to ensure public trust and confidence in the sector is not compatible with acting as a ‘cheerleader’ for the sector, and</li> <li>d) a strong, thriving civil society needs to meet the challenges of a rapidly changing world, through innovation and democratic principles. Sometimes the best assistance Government can provide is merely getting out of the way.</li> </ul>
10.	<p><b>Object 2 – The role of the ACNC in sustaining the NFP sector</b></p> <p>Consider that the Government can assist to build and sustain the NFP sector’s financial, governance and innovative capacity in other ways that is distinct from the ACNC’s regulator role, for example through:</p> <ul style="list-style-type: none"> <li>a) implementing the Productivity Commission Draft Report on Inquiry into Human Services recommendations about extending funding contract length for service providers,</li> <li>b) stimulating social innovation and incentivising new approaches in social impact investment and outcomes measurement,</li> <li>c) helping to implement a sector wide outcomes reporting framework that forms part of, or complements, the ACNC Annual Information Statement process and assists NFPs in demonstrating to donors and investors how they make an impact and their value</li> <li>d) removing barriers to NFPs and social enterprises scaling for impact,</li> <li>e) revisiting a model for establishment of a National Centre for Excellence as an aggregator, network facilitator, thought leader and catalyser for development of the NFP sector,</li> <li>f) encouraging philanthropists and corporate givers to support innovation in the sector. For example, adoption of Program Related Investments (PRI) to achieve outcomes.</li> </ul>
11.	<p><b>Object 2 – Charity sector financial status and revenue sources</b></p> <p>Consider that:</p> <ul style="list-style-type: none"> <li>a) diversifying income streams and establishing income streams independent of government contracts is a valuable strategy to address funding vulnerability and secure a charity’s future</li> <li>b) further work be done by the ACNC into the issue of charity revenue concentration and diversification to better understand how this impacts charity financial viability, risk and sustainability</li> <li>c) charities should be encouraged to build financial stability via equity in their balance sheets, and</li> <li>d) an organisation’s Board has a critical role in change or innovation, and in risk management and/or oversight related to generating new income streams or investments. A Board that is highly risk adverse to change or innovation can impede progress.</li> </ul>

12.	<p><b>Object 2 – Supporting and sustaining an innovative NFP sector</b></p> <p>Consider that</p> <ul style="list-style-type: none"> <li>a) available evidence on the state of innovation in the NFP sector reveals that the main driver for innovation in NFP organisations is its people. Their strategic thinking skills and capabilities, a strong focus on networking, delivering outcomes and impacts, and influencing and driving change have underpinned the success and growth of the sector to date. The main barriers identified by NFPs to innovation in the sector include: a lack of funding, high implementation costs, Government regulation and compliance, a lack of necessary knowledge or skills, lack of a clear innovation strategy, lack of senior leadership or vision, and a risk adverse management or culture</li> <li>b) while innovation in the sector can best be achieved by the sector itself, the ACNC’s primary role should be to ensure its’ regulatory framework does not impose undue restrictions on the flexibility and independence of the sector to take risks to innovate, and</li> <li>c) supporting and sustaining an innovative Australian NFP sector should be a high priority but the ACNC should consider itself a facilitator, and encourage the sector itself to step up to drive sustainability and innovation by: <ul style="list-style-type: none"> <li>(i) continuing to build the evidence base for the sector, drawing on the richness of its data on charities and further developing its data driven analysis and analytics to inform, educate and advise the sector, and</li> <li>(ii) looking to leverage its unique position as the national regulator by entering into strategic alliances with sector peak bodies and experts to promote sector innovation through showcasing research on innovation and best practice.</li> </ul> </li> </ul>
13.	<p><b>Object 2 – Reviewing the relevance of Object 2 to the role of the ACNC</b></p> <p>Consider reviewing the ongoing relevance of Object 2 in its current form, and the role and the resourcing of the ACNC to achieve this Object, including amendments to the Act as required.</p>
14.	<p><b>Object 3 - Australian Consumer Law (ACL) Review recommendations</b></p> <p>Consider that the Partnership:</p> <ul style="list-style-type: none"> <li>a) has received feedback from many stakeholders that harmonisation of fundraising regulations is a critical issue for the NFP and charity sector, unlocking potential to focus on outcomes and impact, improving efficiency and reducing regulatory burden and red tape</li> <li>b) in its’ submission of March 2017 to the ACL Review, the Partnership noted its support for these two key recommendations: <ul style="list-style-type: none"> <li>(i) Recommendations 1 - 3: Amend the definition of “trade and commerce” to clarify whether not-for-profit activities fall within or outside the scope of this definition, specifically giving clarity to not-for-profits about what activities might qualify as trade and commerce. There are a number of grey areas that cause some confusion for the sector. The recommendations include education and also a transition period into the final regime for NFP, which the Partnership believes would be helpful for the NFP sector, and</li> <li>(ii) Recommendation 4: The Partnership endorses the critical reform of the fundraising licence regime. In its discussions with the sector this has been one of the key reforms that has been raised with the Partnership on numerous occasions and in different forums. The current, fragmented regulatory landscape is ineffective at regulating fundraising, and compliance with it is burdensome in the extreme. This is a well-identified area of red tape that acts as a barrier to NFPs getting their important work done.</li> </ul> </li> </ul>



	<p>c) noted in its submission of March 2017 to the ACL Review that:</p> <p>(i) fundraising legislation differs significantly between jurisdictions, adding to costs incurred by the NFP sector. Harmonisation of fundraising legislation through the adoption of a model act should be an early priority for governments, and</p> <p>(ii) it specifically agrees with the inclusion of fundraising to fall within the ACL provisions and for the state and territory fundraising laws to be repealed. The ACNC could then carry out the role of regulator of fundraising activities e.g. door knocking and telemarketing as the Partnership sees the ACNC s best placed to oversee this in conjunction with the Fundraising Institute of Australia.</p>
15.	<p><b>Object 3 - Commitment to advocate for a Common Definition of Charity</b></p> <p>Consider that leadership and support from the Commonwealth Government for a common definition of charity would assist the implementation of regulatory and reporting alignment and harmonisation initiatives.</p>
16.	<p><b>Object 3 - Commitment to align State and Commonwealth Governments Fundraising, Revenue and Incorporated Associations Reporting</b></p> <p>Consider that in several jurisdictions efforts by ACNC to progress alignment in bilateral and multilateral meetings with government agencies have had limited success. Public commitment by the Commonwealth Government would assist to give these initiatives greater priority and support on the part of states and territories.</p>
17.	<p><b>Object 3 - Implementation of a national system of working with children and vulnerable people checks</b></p> <p>Consider:</p> <p>a) the recommendations of the <i>Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse</i> to implement National Child Safe Standards, in particular, ensuring that relevant NFP staff and volunteers have Working With Children Checks</p> <p>b) implementation of a national system of Working with Children Checks should be a priority for the NFP sector, and should also be extended to a national system of checks for those working with vulnerable people. The ACNC can play an important role as the national regulator in ensuring a consistent national system of codes of conducts and good practice for the sector, and</p> <p>c) the benefits of implementing a national system of checks is two-fold, it meets the need for:</p> <p>(i) more streamlined arrangements for NFP entities, reducing red tape for the sector and providing a more efficient and effective national system, eliminating duplication and inconsistencies, while maintaining public trust and confidence in those institutions, and</p> <p>(ii) more consistent national police checks to help ensure the wellbeing and safety of children and vulnerable people, such as people with disability and the frail older people, in institutional care or receiving services and support from NFP organisations, in particular their staff and volunteers.</p>
18.	<p><b>Object 3 - Promotion of common financial reporting</b></p> <p>Consider that the ACNC is the appropriate organisation to encourage the Australian Accounting Standards Board to develop an appropriate agreed standard of financial reporting protocols for the sector. Currently no standard exists, and it is very difficult for any interested parties to compare the relative financial performance of charities. Specific accounting provisions for the</p>

	NFP sectors have been agreed in the Singapore and New Zealand jurisdictions. This is particularly relevant in relation to the reporting of consolidated accounts.
19.	<p><b>Object 3 - Overlap between the ACNC Acts and Corporations Law</b></p> <p>Consider a review of the technical overlap between the ACNC Acts and Corporations Law to ensure consistency between each.</p>
20.	<p><b>Object 3 - Representation at Council of Australian Governments (COAG)</b></p> <p>Consider that the ACNC having an identified role on COAG would ensure a suite of legislative and practical measures to strengthen a nationally consistent approach to the NFP sector.</p>
21.	<p><b>Object 3 - Mandatory use of ACNC Charity Passport by Government</b></p> <p>Consider that:</p> <ul style="list-style-type: none"> <li>a) use of the ACNC Charity Passport would enable authorised government agencies to access ACNC charity data via a file protocol process to reduce red tape for charities. By allowing agencies to access charity data directly from ACNC, the Charity Passport would reduce the amount of information that charities must provide to different government agencies, in line with a ‘report once, use often’ reporting framework</li> <li>b) there is considerable opportunity to increase use of the ACNC Charity Passport service, with the potential to use the Charity Passport as a mandatory requirement for funding purposes across the Commonwealth Government, for example in the assessment of grant applications by the Department of Social Services Community Grants Hub. Organisations that are not charities would not be disadvantaged, and could apply for and acquit grants as normal, however charities would be relieved from providing information to government that is already held by the ACNC, and</li> <li>c) a national Volunteer Passport could also offer benefits in streamlined arrangements for NFP entities, reducing red tape for the sector and in attracting and retaining volunteers in the sector.</li> </ul>
22.	<p><b>Object 3 - Clarify the withholding provisions concerning Private Ancillary Funds (PAFs) and other organisations</b></p> <p>Consider that it would be preferable for charities and ACNC if all identifiable information about PAFs could be simply withheld from the ACNC Register upon request from the PAF. De-identified information about PAFs could still potentially be published by ACNC in its public datasets. The withholding provisions applicable to PAFs should be reviewed to better support the government’s policy intent. The withholding of information could be widened to include other organisations, which would appropriately benefit from this reform.</p>

## Section 2:

### **Detailed Response by the Prime Minister's Community Business Partnership (the Partnership) to the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation (the ACNC Legislation Review)**

#### **1. Introduction**

The Partnership's response to the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation is focused primarily on evaluating the ongoing suitability and effectiveness of each of the three objects of the principal Act, that is:

- a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector
- b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector, and
- c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

This Submission also responds to the suggested 'focusing questions' for submissions provided with the Review Terms of Reference (ToR) and addresses the paper prepared by the ACNC that sets out its views on the matters to be considered by the Review Panel.

The Partnership's key remit is to encourage greater levels of giving and social investment in Australia. A critical underpinning of a healthy philanthropic culture is unarguably public trust and confidence in the charities and intermediaries that manage and disperse charity monies, whether received from corporate Australia, high-net-worth individuals or average Australian givers.

In developing its views, the Partnership has considered:

- the appropriate role for Government
- the desirability of the sector being empowered to determine its own future, build its capability, effectively manage its resources and drive innovation
- the competing priorities inherent in the three objects. For example, tensions can exist between enforcing a regulatory framework to underpin public trust and confidence in the sector while still supporting the sector to be flexible, independent and innovative in its operations, and
- the risk that increased regulation could have unintended negative consequences, for example in impinging on the sector's ability to deliver a diverse and complex array of services.

In developing its submission, the Partnership has drawn on research and listened to the views of a wide range of government and sector stakeholders, practitioners, leaders and experts, in particular about the obstacles and enablers of giving and volunteering.

#### **ToR focusing questions:**

- **Are the objects of the ACNC Act still contemporary?**
- **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?**

#### ***1.1 Understanding charities and philanthropic giving and volunteering in Australia***

Australia is well served by its vibrant charity sector. Competitive and innovative charities benefit the community and the economy in the same way that competitive and innovative businesses benefit

consumers. Charities exist to benefit the community. They form under the principles and precedent set out in four centuries of charity law and with a right to freedom of association.

Australian charities deliver wide-ranging services both here and abroad. They enhance the fabric of our society and their work addresses gaps and unmet needs of many in society. The charity sector is ingrained in our culture, economy and society. A vibrant and competitive sector is not afraid to take prudent risks that is good for charities and good for the communities in which they operate.

The sector has a proud history of innovating -- sometimes compelled by scarce resources, but always driven by a passion to improve the circumstances of others. The sector knows how to adapt, is harnessing new technology and is continuing to produce excellent outcomes for the greater good.<sup>1</sup>

Australians recognise the positive contribution and influence charities have on society. The majority of Australians (around 80%<sup>2</sup>) regularly engage with the charity sector, based on the knowledge there would be a clear and measurable outcome and an understanding that a high proportion of funds they donate contribute or the time they volunteer towards the cause they choose as important to them. Most Australians consider it important that a regulator for the charities sector exists, largely based on the financial value of the sector and the values that underpin philanthropic giving.<sup>3</sup>

There is a delicate balance to be struck between respecting and sustaining the values that underpin philanthropic giving, and the open engagement and trusting relationships between donors and charities, with the role of government as regulator to ensure that charities operate effectively and make good use of donor dollars, while not overburdening the sector with regulation or deterring philanthropy.

There are concerns from the sector and others<sup>4</sup> that the balance in Australia is tilted in favour of over regulation, largely due to the amount of duplicate regulation, where much of this is due to federalism.

Charities consider Government regulation as overly restrictive<sup>5</sup>, especially for volunteering, with the need for police checks and Responsible Service of Alcohol (RSA) and Food Safety Compliance certificates for volunteers (for example at local fundraising events). Although they recognise the importance of such regulation, there is a general sentiment that red tape should be minimised as it can be time-consuming and deter existing and potential volunteers.

There is a need for state governments to cede some of their powers in order to reduce red tape, such as harmonising requirements across state borders so that there is consistent national regulation and standards applying to the charities sector, and the NFP sector overall.

The problem facing the NFP sector in Australia is seen by some as one of too much duplicated regulation. In the case of charitable NFPs, the challenge is to pare this regulatory burden while still reassuring donors they can give their time and money confidently. Consequently, charity regulation is often seen a trade-off, where red tape is a significant burden with many costs and disadvantages, but it is a necessary evil to ensure the charity sector is well governed.

The risk of government overregulation may destroy the very virtues that brought charitable organisations into the government's orbit in the first place i.e. Australian government contracting out services to NFPs expressly because these groups were closer to their clients, more zealous in their

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<sup>1</sup> 'Strong Diverse Charities Are Good For Australia', Susan Pascoe, The Huffington Post Blog, 25 October 2016

<sup>2</sup> *Giving Australia 2016 Report – Individual giving and volunteering* DSS August 2017

<sup>3</sup> ACNC Public Trust and Confidence in Australian Charities 2017. Market Research Report Oct 2017

<sup>4</sup> 'THE FUTURE OF CHARITY REGULATION IN AUSTRALIA: COMPLEXITIES OF CHANGE', John Vaughan-Williams, *The Adelaide Law Review*, Volume 37 Issue 1 (2016)

<sup>5</sup> *Giving Australia 2016: Giving and volunteering: the nonprofit perspective*, November 2017 DSS .page.72

missions, and more willing to experiment with innovative solutions than their government counterparts.

The goal should be to provide adequate oversight for the NFP sector by non-government means. Non-government regulation is not just a matter of saving taxpayer money by lessening the need for government regulation but it is crucial to preserving one of civil society's greatest resources: its independence.<sup>6</sup>

In a world where charity choice is increasingly global for donors and volunteers, there are greater possibilities but also more competition for charities and NFP organisations trying to connect with potential donors and supporters. Understanding and appealing to donor motivations and adapting to their preferences (particularly as new generations enter with different triggers and expectations) are more important than ever for charities to achieve good outcomes. Donors and volunteers want to be a part of something that creates impact and where they can see that impact.<sup>7</sup>

Charities have identified several areas in the regulatory environment they felt could be used to stimulate giving and volunteering:

- minimising red tape especially for volunteering (e.g. the expense of RSA checks and cost and time of non-transferable police checks on people working with children or vulnerable people)
- privacy regulation, which was seen as difficult to understand and implement well
- restrictive taxation arrangements, which was seen as less supportive than international tax treatment approaches for charities and social enterprises
- policy initiatives to stimulate giving, especially those with perceived untapped potential such as bequests and workplace giving, and
- ongoing collection, coordination and availability of research data to help NFP organisations operate most effectively.

The Partnership considers that the Review Panel should have due regard to the question of balancing the respective roles and priorities of the charity sector and of government in shaping its' final recommendations to Government.

### ***1.2 The role of the ACNC Advisory Board in engaging and connecting with the sector***

The Partnership notes the submission made to the ACNC review by the ACNC Advisory Board (the Board), and the potential for the Board's role to be better articulated in the Act to enhance its advice to the Commissioner and the Minister, and having a broader representation at both a geographical and functional level.

The Partnership notes the current ACNC Act appears to limit the current role of the Board and its potential to assist the ACNC to engage and connect with the sector, and to deliver valuable insights and advice to the Commissioner and to the Minister:

- Section 110-20 of the ACNC Act places no obligation on the Commissioner to have regard to the Board's advice and recommendations given to them, or to attend Advisory Board meetings, and
- Section 135-15 of the ACNC Act specifies the powers and functions of the Board, and that the Board's ability to provide advice and make recommendations to the Commissioner can only be done at their request.

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<sup>6</sup> 'Independent Charities, Independent Regulators: The Future of Not-for-Profit Regulation', Helen Rittelmeyer, .Issue Analysis No. 143, 6 February 2014, The Centre for Independent Studies (CIS)

<sup>7</sup> *Giving Australia 2016: Giving and volunteering: the non-profit perspective*, November 2017 DSS

The Partnership considers that the Review Panel should review those sections (110-20 and 135-15) of the ACNC Act that limit the operation and effectiveness of the ACNC Advisory Board, so as to

- enhance its ability to engage and connect with a highly diverse and evolving sector
- build effective partnerships and alliances with sector peak bodies, research bodies and other relevant government advisory groups, such as the Partnership
- ensure it has appropriate and balanced Board representation from the sector, donors and investors and government, and
- enable it to deliver valuable insights and advice to the Commissioner and to the Minister, whether on request or self-initiated.

The Review Panel should consider whether the Board should be Ministerially appointed, but ensure all stakeholders views are reflected in its' membership and with some capacity to co-opt youth or Indigenous representatives or particular subject matter experts on a rotating or as needs basis.

### **1.3 Core principles and key values to ensure balance in the regulatory framework**

The Partnership notes that six key values underpin the current ACNC regulatory approach: fairness, accountability and transparency, independence, integrity and respect. These values are, in turn, underpinned by three core regulatory principles (stipulated in the principal Act, 15-10):

- *Regulatory necessity* - Minimise regulatory requirements to those necessary to enable assessment of compliance with the ACNC Act and Regulations and not burden charities any more than is reasonably necessary in the circumstances
- *Reflecting risk* - Operate under a risk-based regulatory framework that gives consideration to the particular circumstances of different charities and supports them to comply with their obligations,
- *Proportionate regulation* - Regulatory actions are proportionate to the problems it seeks to address.<sup>8</sup>

The Partnership suggests that the Review Panel have due regard to these key ACNC values and core regulatory principles in maintaining a fair and reasonable balance between government regulation and control and sector independence and flexibility in shaping its' final recommendations to Government.

#### **ToR focusing questions:**

- **Are there gaps in the current regulatory framework that prevent the objects of the Act being met?**
- **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?**
- **Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?**
- **Are the powers of the ACNC Commissioner the right powers to address the risk of misconduct by charities and not-for-profits, or those that work with them, so as to maintain the public's trust and confidence? Is greater transparency required and would additional powers be appropriate?**

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<sup>8</sup> ACNC Regulatory Approach Statement

## **2. Object 1: Maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector**

Object 1 is the substantive guiding principle and *raison d'être* for the ACNC role and functions. The ACNC has performed this primary function to a high standard since inception. Prior to its establishment, Commonwealth regulatory oversight of the charitable sector was dispersed across a number of bodies, primarily the Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO). In its five years of operation, the case for maintaining a central regulatory function has been well demonstrated.

The Partnership reiterates its previous strong support for the role of the ACNC as regulator. Ensuring, maintaining and building strong public trust and confidence in the Australian charitable sector should remain the ACNC's key priority. It should also continue to ensure adherence to appropriate governance standards and assist with the streamlining of cross jurisdiction legislation.

### **2.1 Legislative Review and Possible Amendments**

The Partnership supports these recommendations made by the ACNC in its submission to the review, where its proposed legislative amendments would allow the ACNC to better meet its objectives of good governance, transparency and accountability of the sector:

- *ACNC Recommendation 1*: The Partnership agrees that the ACNC needs powers to protect the assets of organisations that have been deregistered by the ATO. The minimum expectations of donors is that their charitable contributions are appropriately dealt with in terms of community best interests and the originally intended use of the assets for the public good
- *ACNC Recommendations 5-6*: The Partnership supports enabling the ACNC to post relevant information about registered charities on its public website, in pursuit of its' meeting the policy objectives of Object 1, and consistent with the public interest
- *ACNC Recommendations 7, 8 and 17*: The Partnership agrees that relevant Governance regulations in the ACNC Acts be reviewed to ensure appropriateness and consistency for best practice in the charities sector
- *ACNC Recommendations 10-15*: Modifying current secrecy and disclosure provisions of the ACNC Act will improve transparency. The Partnership generally agrees that the ACNC should be able to publish circumstances surrounding misconduct of a charitable organisation where it is in the public interest for this to occur, and after vigorous and appropriate investigations have been conducted
  - The Partnership urges the ACNC to undertake consultation with the sector and appropriate bodies such as the Office of the Australian Information Commissioner before any changes are made to the Act, in order to protect the privacy rights of charities (and their board members, staff, volunteers and donors)
- *ACNC Recommendation 24*: The Partnership agrees it should be mandatory for the auditors of charitable organisations to report to the ACNC a significant contravention of the ACNC Act, and
- *ACNC Recommendation 40*: The Partnership agrees to the need to better define 'government entity' in the Charities Act to increase clarity, certainty and internal consistency.

#### **ToR focusing question:**

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

## **2.2 Extending the ACNC regulatory framework**

The ACNC estimates that there are approximately 7,500 companies limited by guarantee and 131,000 incorporated associations that are 'non-charitable' NFPs.

Arguably, there is a strong case to extend the regulation ACNC offers charities to non-charitable NFP organisations, and strengthen public trust and confidence across the whole sector and promote high standards of service.

In general, the Partnership supports the idea of a larger percentage of NFPs being on the ACNC register to ensure a single portal for potential donors and the public to access, subject to the caveats below.

However, any extension of the regulatory framework needs to be proportionate to the risks as well as the potential benefits. The Partnership suggests some issues the Review Panel should consider are:

- many NFPs have no or only a minimal legal form, operate for the mutual benefit of members and are low risk in terms of likely breaches of public trust – would compliance costs outweigh expected benefits?
- a lack of effective sanctions or penalties the ACNC could exercise to ensure compliance from non-charity NFPs who come under the ACNC regulatory framework
- whether the costs and risks associated with extension of the framework are proportionate to the actual or perceived problem(s) it seeks to address and the anticipated benefits for the sector, government and the public
- unintended effects or perverse consequences of extending the framework, such as additional compliance burden for a significant number of small incorporated NFPs which currently operate under minimal reporting requirements to state/territory authorities
- the sector is not homogenous, it is highly diverse which suggests a highly unequal distribution of effects and outcomes for charity and non-charity NFPs – large and small - across the entire sector
- the possible pathways (and transitions) to extend appropriate levels of regulation to different classes of non-charity NFPs (such as Co-Ops and Mutuals)
- the need to harmonise or streamline ACNC regulatory reporting and reporting requirements of state/territory authorities (e.g. annual filing of returns and fees) for a large number of small incorporated NFPs
- expanding the ACNC's reach would require a commensurate increase in resources, arguably not a well-targeted use of government spending, and
- a massive expansion of ACNC responsibilities (i.e. from some 55,600 charities currently registered with the ACNC<sup>9</sup> to up to 600,000 NFP organisations in Australia<sup>10</sup>) would impinge on its ability to robustly regulate charities and to continue to give Australian donors confidence to grow philanthropy.

The Partnership suggests that an alternative could be a partial expansion of the ACNC regulatory framework to particular classes of NFPs, in particular those that attract tax concessions i.e. licensed clubs and/or larger NFPs and those that operate in multiple jurisdictions.

The Partnership considers attention should be given to how (or if) non-charitable NFPs could be supported to greater levels of self-regulation through voluntary codes of conduct. This could both

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<sup>9</sup> [www.acnc.gov.au](http://www.acnc.gov.au)

<sup>10</sup> [http://eprints.qut.edu.au/75397/4/75397\(updated\).pdf](http://eprints.qut.edu.au/75397/4/75397(updated).pdf)



increase public trust and would be aligned to an empowered sector committed to determine its own future, build its capability, effectively manage its resources and drive innovation.

In addition, consideration could be given to the current legal structures available to NFPs (including social enterprises), and whether Government reform in this area would provide NFPs with a more simplified, consistent and fit-for-purpose regulatory environment. There are, however, some categories of NFPs that may require exclusion from any blanket changes, such as exclusion of:

- Indigenous NFP organisations currently regulated by the Office of the Registrar of Indigenous Corporations (ORIC), and
- Social enterprises which operate as for-profit business entities with a social purpose, which reflects the bifurcation of the social enterprise sector between NFP and for-profit enterprises.

The Partnership notes the current exemption of basic religious charities from complying with the governance standards and from providing annual financial reports, regardless of the amount of their annual revenue.

The Partnership considers a level playing field should operate in respect of all charities, without regard to the religion or beliefs of the NFP and its purpose. Greater transparency across religious charities is to be encouraged to ensure greater public trust and confidence.

We therefore suggest that the Review Panel should review the current blanket exemption that applies to basic religious charities to ensure a fair and equitable regulatory treatment of charities across the sector.

**ToR focusing question:**

- **What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?**

### ***2.3 Behaviours of charities that erode public trust and confidence***

Any nefarious behaviour by charities and NFPs reflects on the whole sector. Many established charities have shared their concerns with the Partnership about the potential for poor practices to negatively impact on fund raising and retention and attracting of volunteers. Issues of concern raised in the *Giving Australia 2016* report<sup>11</sup> include:

- charities that are intrusive and/or exploit or harass potential donors, for example excessive cold calls and mail, street ‘chuggers’ and reports of vulnerable citizens being taken advantage of<sup>12</sup>. This pressure presents a dilemma for participants as they generally believe in the cause or know it is important, yet are reluctant to give under perceived pressure. Furthermore, the ‘polished spiel’ of street fundraisers was considered widely to lack authenticity and pointed to the commercialisation of giving, something that some research participants found abhorrent, and many felt uncomfortable about
- the perception that charities need to reduce disproportionate fixed costs (e.g. administrative expenses), although noting the legitimate need for charities to invest in technology, infrastructure and capacity

<sup>11</sup> *Giving Australia 2016* DSS August 2017

<sup>12</sup> Widespread media speculation that Olive Cooke, who having received almost 3,000 mailings from charities in a year contributed to her death, the [report from the Fundraising Standards Board \(pdf\)](#)

- perception of multiple charities addressing similar if not the same causes widely perceived as resulting in ‘wasted resources’ and effectively diluting the impact of finite resources, and
- donor fatigue - too many causes may lead to donors being overwhelmed and disillusioned.

The *Giving Australia Individual Report 2016* (pages 28-29): provides insights into the reasons people do not donate:

Giving Australia research also identified a key role for trustees in ensuring sound financial management of trusts, although the perceived need to employ professional advisers varied with the scale and complexity of philanthropic activities. In addition, just over half of the respondents to the Giving Australia *Philanthropy and philanthropists* survey indicated their fund applies some form of ethical screening to investment decisions. This may be a negative screen, where investments perceived to create negative social or environmental impacts are screened out (for example, tobacco, weaponry, deforestation); or a positive screen, where investments perceived to create positive impact (such as health care, renewable energy and sustainable development) are screened in.

The rapid adoption of digital tools for social and political action has brought unarguable innovation and opportunity across the sector. However, “digital civil society” also brings with it a complicated new set of risks associated with the ways people and organisations use private resources for public benefit.

The Review Panel should take into account the critical need for safe, ethical and effective use of private digital resources (e.g. digital donor data) for public benefit, and to maintain public trust and confidence.<sup>13</sup> This may call for the creation of new approaches to governing and regulating digital assets and support and tools for the charitable sector.

*Giving Australia* participants expressed concern about their information being made available, which has the effect of opening the door to ongoing calls. “They still keep ringing me ... they share lists you see. So, if you’re on someone’s list then you’re on about 20 lists.” (Interview, Everyday giver, QLD)

Evidence from the Partnership’s own consultations<sup>14</sup> about the need for investment in digital giving platforms and the adoption of new digital and online technologies is that while these are recognised as critical for innovation, the costs are seen as an administrative “overhead”, lacking support internally (from the Board) and externally (from donors, as an acceptable use of donated funds).

**ACNC two additional Objects (Recommendation 2 of the ACNC Submission), to:**

- **Enhance the accountability of the NFP entities to donors, beneficiaries and the public, and**
- **Promote the effective use of the resources of not-for-profit entities.**

#### **2.4 Enhanced accountability of NFP entities**

The Partnership does not support the proposed additional object to enhance the accountability of charities to donors, beneficiaries and the public.

This goal is already explicit in the principal Act (15-10, 45-5 and 50-5) and is implicit in Object 1 as part of the goal of enhancing public trust and confidence in the sector. It would also appear to be well

<sup>13</sup> *Philanthropy and Digital Civil Society: Blueprint 2018. The Annual Industry Forecast* by Lucy Bernholz  
[The Digital Civil Society Lab at Stanford University's Centre on Philanthropy and Civil Society.](#)

<sup>14</sup> <https://www.communitybusinesspartnership.gov.au/about/working-groups/innovation-and-culture/>

served through the ACNC's existing core functions, specifically monitoring and managing compliance and providing education and advice.

The Partnership considers this goal can be best achieved through appropriate education and guidance by the ACNC rather than through adding a new object in the principal Act.

## **2.5 Effective use of resources of NFP entities**

The Partnership is not convinced of the need for the ACNC's proposed additional object to promote the effective use of the resources of not-for-profit entities.

This goal appears to fall outside of the scope of the ACNC's primary regulatory role and could be seen as regulatory overreach. We note the ACNC Commissioner's recent public comments<sup>15</sup> that:

- “These recommended objects are not designed to create restrictions or impose limitations on charities. They are not additional enforcement powers, but rather a mandate for the ACNC to support and promote effective and efficient use of resources. We believe the ACNC can play an important educative role for charities and the public on the importance of efficiencies, the challenges of operating in a not-for-profit market, and the opportunities available to organisations to increase their own efficiency.”

The ACNC Commissioner went on to cite the work the Community Council for Australia (CCA) and in particular, the CCA report *Better Using Our Assets* that considered key efficiency topics for the sector.

The Partnership notes that the CCA report offers a useful set of proposals for sector reform, including that NFPs should develop appropriate measures (to measure impacts) and report about their success.

The CCA report offers a useful definition of what can reasonably be considered to constitute NFPs resources (or assets), which include not only tangible resources, such as funds, property, but also expertise and people, knowledge and insights and brand and relationships. The latter could be also be seen as encompassing reputation (and implicit within that, public trust and confidence).

The Partnership suggests therefore that the effective use of the resources of NFP entities goes well beyond the financial and embraces a diverse range of tangible and intangible resources for NFPs to manage. The CCA report recommends that all NFPs should seek to better understand risk and opportunity in managing their organisation.

The effective management of staff and volunteers as its' primary resource is arguably one of the greatest challenges for individual NFP organisations and for the sector as a whole. It contains some of the greatest risks for the sector in terms of public trust and confidence and the extent to which charities build and sustain their brand/reputation with the community.

The *ACNC 2016 Charity Report highlights* that as half of charities employ no paid staff, the role of volunteers in charities is critical. Together, charities drew on the volunteer efforts of 2.9 million people over the year, where median number of volunteers per charity was 10 people. Nearly half a million volunteers' main activity was in emergency relief or social services sectors.

The Partnership questions whether the ACNC should divert its efforts from its primary regulatory role to pursue this issue, given the best use of resources is a matter for the judgment and capacity of NFP organisations.

While there might be scope to offer practical advice, tools and resources to support the more effective use of charitable resources, this would be best done by the sector itself and by other existing or new bodies, more clearly charged with a capacity-building and support role for the sector.

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<sup>15</sup> Commissioner's Column – 25 January 2018 <http://www.acnc.gov.au>

While the ACNC has a facilitative role to play, there is a careful balancing needed of its facilitator role with its role as the regulator of the sector.<sup>16</sup> The Partnership considers that the ACNC should continue to play an active facilitator role in education and guidance for the sector in relation to, among other things, financial management and good governance. The ACNC could enhance the online resources it offers on the ACNC website (i.e. webinars, factsheets) to cover other related topics, such as volunteer management and risk management.

The ACNC could use its position more strategically to facilitate and encourage a greater preventative and early intervention role with charities that are exhibiting early signs of financial and other institutional stress and risk.

The Partnership suggests that a more appropriate focus for the ACNC may be on the impacts that charities achieve, in line with the ACNC twin goals of transparency and accountability to underpin public trust and confidence in the sector. For example, a role for the ACNC as a facilitator to encourage a greater focus in the sector on outcomes and impacts measurement and reporting, including via the ACNC Governance Standards for charities.

### **3. Object 2: Support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector**

#### ***3.1 The role of the ACNC in sustaining the NFP sector***

The Partnership notes that the Productivity Commission's 2010 recommendations (p117), did not believe the regulator should have a role in sector development. The PC felt the regulator's responsibilities should, "be limited to those relating to registration and reporting associated with demonstrating compliance with the legal requirements that underpin public trust and confidence in the NFP sector".

Inaugural ACNC Commissioner Ms Susan Pascoe has recalled that,

"The ACNC was conscious of the need to manage the tension between its keenness to engage with and support the sector, and its responsibility to supervise and regulate it."<sup>17</sup>

Ms Pascoe has also remarked that,

"it is unusual for a regulator to have a requirement to support the sustainability of a robust, vibrant, independent and innovative sector. Unsurprisingly, there were few models within Australia or internationally for the ACNC to adopt, and no additional budget for this object."<sup>18</sup>

Ms Pascoe had earlier noted that objects two and three were only added following successful lobbying from sector advocates, and only after the Cabinet had already agreed to the single (first) object and the budget allocation for the ACNC. She recalls how the ACNC stretched its budget to ensure the sustainability object was not ignored, taking the view that the ACNC could support the sustainability of the sector by building the evidence base on which it could operate and developing its data analysis capability, and sharing that data and knowledge broadly to strengthen the understanding of the sector. For example, through the ACNC's annual *Australian Charities Report*.

Arguments for keeping the regulatory role separate from capacity building include the need for the ACNC to avoid the actuality or the perception of 'regulatory capture'. There is also an argument that the sector should be directing its own development, and that too much involvement from Government can quash innovation.

Evidence suggest that regulatory bodies overseas maintain this separation of roles, for example:

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<sup>16</sup> 'ACNC: the facilitative regulator — a case study of proactive reform', by Krystian Seibert, 01/08/2016 <https://www.themandarin.com.au/68308-acnc-proactive-reform-establish-facilitative-regulator/>

<sup>17</sup> 'The Digital Regulator', Susan Pascoe in *Regulating Charities: The Inside Story*. Edited by Myles McGregor-Lownes and Bob Wyatt (2017).pp211-232: p.216

<sup>18</sup> 'ACNC five years on: Reflections of the Inaugural Commissioner, Susan Pascoe AM. 26 Sept 2017. ACNC website

- The Charities Service in New Zealand<sup>19</sup> administers the Charities Act 2005 and is part of the Department of Internal Affairs but supports an independent Charities Regulation Board that applies the Act and makes decisions on the charitable status of organisations. The roles of the Charities Service is to promote public trust and confidence in the charitable sector and to encourage the effective use of charitable resources. The latter it does by registering and monitoring charities and processing Annual Returns. It also encourages good governance and management practices by educational support, advice and materials. These are broadly consistent with the ACNC's Object 1 but it does not play a broader role in sector development akin to the ACNC's Object 2, and
- The Charity Commission for England and Wales' *Revised Regulatory Statement*<sup>20</sup> states that it best fulfils its statutory objectives by concentrating on the following: promoting compliance by charity trustees with their legal obligations; enhancing transparency and the rigour with which we hold charities accountable; promoting the effective use of charitable resources by raising awareness, supporting trustees and enabling them to comply with their duties; and ensuring that only bodies that properly qualify as charities under the law are registered. Many of these roles are also consistent with the ACNC's role under Object 1 but again fall well short of the broader sector development role envisaged in Object 2.

Evidence in a recent report from the UK House of Lords into the performance of the UK charity regulator<sup>21</sup> noted that, "public trust and confidence in the sector depends on there being an effective regulator. Such a role is not compatible with acting as a 'cheerleader' for the sector". The report also noted that, "the Charity Commission's regulatory focus may have come at the expense of its other role as an advisor and enabler to the charity sector" and that "in response to significant resource constraints, the Commission appears to be moving away from an advisory role", with sector peak bodies increasingly meeting this need from the sector.

A strong, thriving civil society needs to meet the challenges of a rapidly changing world, through innovation and democratic principles. Sometimes the best assistance Government can provide is merely getting out of the way.

Government can assist to build the sector's capacity in other ways that is distinct from the ACNC's regulator role. This includes through for example:

- implementing the Productivity Commission Draft Inquiry into Human Services Report<sup>22</sup> recommendations about extending funding contract length for service providers
- stimulating social innovation and incentivising new approaches in social impact investment and outcomes measurement
- helping to implement a sector wide outcomes reporting framework that forms part of, or complements, the ACNC Annual Information Statement process and assists charities in demonstrating to donors and investors how they make an impact and their value
- removing barriers to NFPs and social enterprises scaling for impact
- revisiting a model for establishment of a National Centre for Excellence as an aggregator, network facilitator, thought leader and catalyser for development of the charity sector and the broader NFP sector, and

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<sup>19</sup> <https://www.charities.govt.nz/>

<sup>20</sup> <https://www.gov.uk/government/publications/charity-commission-statement-of-mission-regulatory-approach-and-values/charity-commission-statement-of-mission-regulatory-approach-and-values#our-statutory-objectives>

<sup>21</sup> 'Stronger charities for a stronger society'. House of Lords Select Committee on Charities Report of Session 2016–17 HL Paper 133, 26 March 2017 pp100-103

<sup>22</sup> Productivity Commission draft report on Inquiry into Human Services

- encouraging philanthropists and corporate givers to support innovation in the sector. For example, adoption of Program Related Investments (PRI) to achieve outcomes<sup>23</sup>.

### **3.2 Charity sector financial status and revenue sources**

The Partnership notes the *ACNC 2016 Charity Report* comment that, “While financial status indicators do not capture charity performance in achieving impact, in aggregate they offer a helpful indication of sector viability, stability and sustainability (ACNC, 2016), and can be used to explore differences in financial orientation and exposure to financial risk among different types of charities.”

The Partnership notes that the *ACNC 2016 Charity Report* considers the issue of revenue diversification of the sector and notes that, “Dependence on a narrow range of revenue sources can be a sign of financial vulnerability, and diversified revenues are usually seen as more flexible and sustainable.”

The *ACNC 2016 Charity Report* found that, “Charities are diverse: there is no one-size-fits-all approach to financial performance or sustainability. It is highly dependent on individual charities’ strategy for achieving purpose and their operating context. A charity’s financial status depends on a range of factors, including their purpose, strategy, funding environment, accounting policies, overheads and their wider operating context.”

A charity’s financial reserves or equity plays an important role in their financial stability and long-term sustainability<sup>24</sup>. Managing reserves is an important aspect of the overall financial management of a charity and a crucial element of good charity governance. Charities should therefore be encouraged to build financial stability via equity in their balance sheets.

In line with good governance and proper risk management, a charity’s responsible persons (i.e. its board, committee, or governing body) should consider an appropriate level of reserves for its circumstances, as well as a strategy for building or spending its reserves in a way that is consistent with its purpose.

The *ACNC 2016 Charity Report* notes that there can however be short-comings of using revenue concentration as a marker of risk; revenue concentration may be more desirable for some charities but not for others. It further notes that relatively little research has been done in Australia on charity revenue concentration and diversification.

The CCA report *Better Using Our Assets* suggests that diversifying income streams and establishing income streams independent of government contracts is a valuable strategy to address funding vulnerability and secure an organisation’s future. It further suggests that an organisation’s Board has a critical role in change or innovation, and in risk management and/or oversight related to generating new income streams or investments. A Board that is highly risk adverse to change or innovation can impede progress.

The Partnership suggests further research into the issue of charity revenue concentration and diversification to better understand how this impacts financial viability, risk and sustainability.

### **3.3 Supporting and sustaining an innovative NFP sector**

Available evidence<sup>25</sup> on the state of innovation in the NFP sector reveals that the main driver for innovation in NFP organisations is its people. Their strategic thinking skills and capabilities, a strong focus on networking, delivering outcomes and impacts, and influencing and driving change have underpinned the success and growth of the sector to date. The main barriers identified by NFPs to innovation in the sector include: a lack of funding, high implementation costs, Government regulation

<sup>23</sup> *Program Related Investments – an Opportunity for Australia*. A report prepared by Philanthropy Australia for DSS to assist the Prime Minister’s Community Business Partnership, November 2015

<sup>24</sup> ‘Charity reserves: financial stability and sustainability’ <https://www.acnc.gov.au>

<sup>25</sup> *Innovation Index for the Australian NFP sector 2017*

and compliance, a lack of necessary knowledge or skills, lack of a clear innovation strategy, lack of senior leadership or vision, and a risk adverse management or culture.

The Partnership considers that while innovation in the sector can best be achieved by the sector itself, the ACNC's role should be to ensure its regulatory framework does not impose undue restrictions on the flexibility and independence of the sector to take risks to innovate.

The Partnership considers supporting and sustaining an innovative Australian NFP sector should be a high priority but the ACNC should consider itself a facilitator, and encourage the sector itself to step up to drive sustainability and innovation.

The Partnership considers that the role of the ACNC relative to this objective should be carefully reviewed, including the ongoing relevance of Object 2 in its current form and its possible amendment or removal.

The ACNC can best play a facilitating or catalytic role by continuing to build the evidence base for the sector, drawing on the richness of its data on charities and further developing its data driven analysis and analytics to inform, educate and advise the sector, as well as informing potential donors and philanthropists, and the general public.

The ACNC could look to leverage its unique position as the national regulator by entering into strategic alliances with sector peak bodies and experts to encourage sector innovation through showcasing research on innovation and best practice.

#### **4. Object 3: Promote the reduction of unnecessary regulatory obligations on the Australian NFP sector**

**ToR focusing question:**

- **Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?**

The Partnership considers that the ACNC is well placed to guide red tape reduction for the sector, particularly where it involves cooperative legislative changes across state and federal jurisdictions. We note that the ACNC has achieved some major wins in this area, but there is much work still to be accomplished.

##### ***4.1 Australian Consumer Law (ACL) Review recommendations***

The Partnership has received feedback from many stakeholders that harmonisation of fundraising regulations is a critical issue for the NFP and charity sector, unlocking potential to focus on outcomes and impact, improving efficiency and reducing regulatory burden and red tape. These issues were highlighted in the submissions made by Justice Connect and the ACNC to the Australian Consumer Law (ACL) Review, which the Partnership support.

In the Partnership's submission of March 2017 to the ACL Review, the Partnership noted its support for these two key recommendations:

- Recommendations 1 - 3: Amend the definition of "trade and commerce" to clarify whether not-for-profit activities fall within or outside the scope of this definition, specifically giving clarity to not-for-profits about what activities might qualify as trade and commerce. There are a number of grey areas that cause some confusion for the sector. The recommendations include education and also a transition period into the final regime for not-for-profits, which the Partnership believes would be helpful for the not-for-profit sector, and
- Recommendation 4: The Partnership endorses the critical reform of the fundraising licence regime. In our discussions with the sector this has been one of the key reforms that has been



raised with us on numerous occasions by varied stakeholders, and in different forums. The current, fragmented regulatory landscape is ineffective at regulating fundraising, and compliance with it is burdensome in the extreme. This is a well-identified area of red tape that acts as a barrier to not-for-profits getting their important work done.

The Partnership noted in its submission of March 2017 to the ACL Review that:

“Fundraising legislation differs significantly between jurisdictions, adding to costs incurred by the NFP sector. Harmonisation of fundraising legislation through the adoption of a model act should be an early priority for governments.”

The Partnership further noted in its submission that it specifically agrees with the inclusion of fundraising to fall within the ACL provisions and for the state and territory fundraising laws to be repealed. The ACNC could then carry out the role of regulator of fundraising activities e.g. door knocking and telemarketing, as we see the ACNC as best placed to oversee this in conjunction with the Fundraising Institute of Australia.

The Partnership has suggested below some further areas for reform, which would increase the effectiveness of the ACNC in this regard.

#### ***4.2 Commitment to advocate for a Common Definition of Charity***

The Partnership notes that currently the definitions of ‘charity’ differs between various State, Territory and Commonwealth legislation. Leadership and support from the Commonwealth Government for a common definition of charity would assist the implementation of regulatory and reporting alignment and harmonisation initiatives.

#### ***4.3 Commitment to align State and Commonwealth Governments Fundraising, Revenue and Incorporated Associations Reporting***

The Partnership notes that since the announcement of the retention of the ACNC, two jurisdictions have passed legislation that removes duplicative regulation and reporting for charities. In South Australia, from 2017, incorporated associations that are registered with ACNC will not be required to submit information to the state regulator. South Australian charities registered with ACNC will also no longer need to apply for a fundraising licence, or file annual returns to the state government. In Tasmania, incorporated associations registered with ACNC will no longer need to provide financial reports to government.

However, in several jurisdictions, efforts by ACNC to progress alignment in bilateral and multilateral meetings with government agencies have had limited success. Public commitment by the Commonwealth Government would assist to give these initiatives greater priority and support on the part of states and territories.

#### ***4.4 Implementation of a national system of working with children and vulnerable people checks***

The Partnership notes the recommendations of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse<sup>26</sup> to implement National Child Safe Standards, in particular, to ensure that relevant NFP sector staff and volunteers have Working With Children Checks.

The Partnership considers that implementation of a national system of Working with Children Checks and Police Checks should be a priority for the NFP sector, and that this should also be extended to a national system of checks for those working with vulnerable people. The ACNC can play an important role as the national regulator in ensuring a consistent national system of codes of conducts and good practice for the sector.

The benefits are two-fold in that it meets the need for:

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<sup>26</sup> <https://www.childabuseroyalcommission.gov.au/recommendations>



- more streamlined arrangements for NFP entities, reducing red tape for the sector and providing a more efficient and effective national system, eliminating duplication and inconsistencies, while maintaining public trust and confidence in those institutions and NFPs, and
- more consistent national police checks to help ensure the wellbeing and safety of children and vulnerable people, such as people with disability and the frail older people, in institutional care or receiving services and support from NFP organisations, in particular their staff and volunteers.

#### ***4.5 Representation at Council of Australian Governments (COAG)***

The Partnership consider that the ACNC having an identified role on COAG would ensure a suite of legislative and practical measures to strengthen a nationally consistent approach to the not-for-profit sector.

#### ***4.6 Promotion of common financial reporting***

The Partnership agrees that the ACNC is the appropriate organisation to encourage the Australian Accounting Standards Board to develop an appropriate agreed standard of financial reporting protocols for the sector. Currently no standard exists, and it is very difficult for any interested parties to compare the relative financial performance of charities. Specific accounting provisions for the NFP sectors have been agreed in the Singapore and New Zealand jurisdictions. This is particularly relevant in relation to the reporting of consolidated accounts.

#### ***4.7 Overlap between the ACNC Acts and Corporations Law***

The Partnership recommends that a review of the technical overlap between the ACNC Acts and Corporations Law be completed to ensure consistency between each.

#### ***4.8 Mandatory use of ACNC Charity Passport by Government***

The Partnership suggests that the ACNC Charity Passport enables authorised government agencies to access ACNC charity data via a file protocol process to reduce red tape for charities. By allowing agencies to access charity data directly from ACNC, the Charity Passport reduces the amount of information that charities must provide to different government agencies, in line with a 'report once, use often' reporting framework.

The ACNC Charity Passport has 71 users across 17 agencies. There is considerable opportunity to increase the use of the service, and there is the potential to use the Charity Passport as a mandatory requirement for funding purposes across Commonwealth Government, for example in the assessment of grant applications by the Department of Social Services Community Grants Hub.

Organisations that are not charities would not be disadvantaged, and could apply for and acquit grants as normal, however charities would be relieved from providing information to government that is already held by the ACNC.

This is consistent with the ACNC Recommendation 20 that, "That the Commonwealth government promote the use of the ACNC's charity passport by Commonwealth, State and Territory agencies so as to reduce the regulatory burden on charities."

The Partnership considers that a national Volunteer Passport could offer benefits in streamlined arrangements for NFP entities, reducing red tape for the sector and in attracting and retaining volunteers in the sector. Volunteer Passport schemes are in use across the UK and in France.

The French Volunteer Passport (France Bénévolat)<sup>27</sup> creates a link between the volunteer and NFP organisations. The passport follows the volunteer throughout their volunteering career. The main target groups for the volunteer passport scheme are young people, employees looking for a change of career, and unemployed people seeking to develop their skills and experience.

The purpose of the passport is to:

- list and describe each role the volunteer undertakes
- document any training undertaken by the volunteer
- integrate these elements in a profile of the volunteer, and
- accredit the skills and competences developed through volunteering.

The passport consists of a set of records containing:

- details about the individual volunteer
- details on the volunteering assignment (description, skills developed, any special notes);
- details of any certificates awarded by the organisation (including a description of the achievement, skills developed, any special notes)
- a schedule of all the volunteering roles undertaken by the individual, and
- a record of any training, qualifications or continuing professional development undertaken by the volunteer.

Similar schemes are now emerging in Australia, such as the Be Collective volunteer management initiative<sup>28</sup> that provides an end-to-end management system for charities to manage volunteer membership, engagement, administration and permissions.

#### **4.9 Clarify the withholding provisions concerning Private Ancillary Funds (PAFs) and other organisations**

The Partnership notes that the ACNC holds information about those PAFs that are charities, including information provided at registration or on the Annual Information Statement.

When the ACNC was established, the Government intended to make sure that details, which might identify the donors to PAFs, could be withheld from the ACNC Register, thereby protecting the privacy of the donors. To implement this policy, provision was made in the ACNC Regulations for a range of specific elements of information to be withheld upon application.

Currently, PAFs need to identify and apply for withholding applications for each separate information element, which must then be considered separately by ACNC. This process adds significant workload and inefficiency for ACNC and charities.

It would be preferable for charities and ACNC if all identifiable information about PAFs could be simply withheld from the ACNC Register upon request from the PAF. De-identified information about PAFs could still potentially be published by ACNC in its public datasets. The withholding provisions applicable to PAFs should be reviewed to better support the government's policy intent.

The withholding of information could be widened to include other organisations, which would appropriately benefit from this reform.

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<sup>27</sup> <https://gr-eat.eu/the-volunteer-passport-france-benevolat/>

<sup>28</sup> <https://www.becollective.com/features/#volunteer-management>