

## SUBMISSION IN RESPONSE TO THE REVIEW OF THE AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION (ACNC) LEGISLATION

27 February 2018

### Introduction

Red Cross welcomes the opportunity to make this submission to the review of the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (“**ACNC Act**”) and *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth)*.

Red Cross is strongly of the view that the establishment of the ACNC and its operations over the past five years have been overwhelmingly positive for the charitable sector. Examples include:

- creating a national register providing authoritative and accessible information on charities;
- achieving significant reduction in red-tape for charities fundraising in SA and the ACT;
- useful cross-government coordination with AUSTRAC in publishing the 2017 report on the ‘medium’ risks of money-laundering and terrorism financing in the non-profit organisation sector;
- publishing helpful guidance to the sector (for example regarding ‘Charities and administration costs’ and the meaning of ‘public benevolent institution’ following the decision in the Hunger Project case); and
- getting the balance right between acting neither as ‘friend’ nor ‘bully’ of the sector – but rather performing its role as regulator.

For these reasons, Red Cross remains cautious about calls – including from the ACNC itself – for significant changes to the ACNC Acts.

### About Red Cross

Australian Red Cross Society (ABN 50 169 561 394) (“**Red Cross**”) is a body corporate established by Royal Charter in 1941, having been first established in Australia as a branch of the British Red Cross Society in 1914 at the outbreak of the First World War.

Red Cross is a charity registered with the ACNC, with a subtype of ‘Public Benevolent Institution’.

Red Cross’ vision is “human dignity, peace, safety and wellbeing for all’ and our purpose is to support and empower people and communities in times of vulnerability and to reduce suffering across Australia and internationally through mobilising the power of humanity.

We comprise around 5,500 employees, almost 20,000 volunteers, 17,000 members and 450,000 blood donors. We work across more than 465 sites around Australia, and in 14 countries in the Asia-Pacific.

Red Cross is a member of the [Red Cross Red Crescent Movement](#), a worldwide community of humanitarians with a presence in 190 countries around the world. The Movement has an unparalleled reach with a local,

national and global footprint, uniting us to prevent and alleviate human suffering wherever it may be found. The Movement is bound by a set of [Fundamental Principles](#), obliging us to work without discrimination as to nationality, religious beliefs, class or political opinions.

## **SUMMARY OF RECOMMENDATIONS**

Recommendations made by Red Cross in relation to several of the questions posed are summarised below.

We have also made a number of observations in response to other questions without providing specific recommendations in relation to them.

### **Question 1: Are the objects of the ACNC Act still contemporary?**

Red Cross recommends that:

1. s15-5(1) of the ACNC Act be clarified to provide the suggested hierarchy of objects of the legislation;
2. if the ACNC objects are expanded as proposed by the ACNC, any additional objects in s15-5 (1) should be made subject to and in support of the recommendation above that the overriding and principal object be identified as the object set out in paragraph (b) of s15-5 (1); and
3. any changes to the objects should be made as part of a package of reforms which have the net effect of reducing, or at least not adding to, the net regulatory burdens on the charitable sector. (Some options in this regard are set out in response to Question 8.)

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

If the regulatory framework is to be extended to non-charitable NFPs (as to which Red Cross expresses no opinion), then Red Cross recommends that:

- a. funding arrangements for the ACNC in respect of the charitable NFP sector should be maintained; and
- b. a separate 'Charities Commissioner' be provided within the ACNC.

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

1. Red Cross recommends that further work be undertaken in this area in consultation with the charitable sector before regulatory changes are made, in accordance with the principles referred to in this submission in detail.
2. We suggest that the approach and recommendations set out in AASB Discussion Paper (November 2017) "Improving Financial Reporting for Australian Charities" provide a useful way forward.
3. Red Cross recommends that, if the current secrecy provisions are amended, then Subdivision 150-C of the ACNC Act should be amended to:

- a. ensure the secrecy of an investigation should be maintained until a final decision has been made arising from the investigation;
- b. require ACNC to provide reasons for decisions publicly, unless it is the public interest not to do so.

**Question 7: 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?**

Red Cross recommends that no changes be made to the powers of the ACNC.

**Question 8: Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?**

Red Cross recommends that consideration be given to the identified areas of current regulation, as set out in the body of this submission, with the objective of removing unnecessary regulation and harmonising relevant State and Territory laws.

## **DETAILED SUBMISSION**

### **1. Are the objects of the ACNC Act still contemporary?**

Yes. However, a clear statement of the ranking of the current objects would be helpful as a guide to ACNC in its operation and in its funding arrangements.

#### Recommended clarification

Section 15-5(1) sets out the objects of the ACNC Act as follows:

- “(a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (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.”

The objects in paragraphs (a) (enhancing public trust and confidence) and (c) (reducing unnecessary regulatory obligations) are best understood as means of furthering object (b), which in our view is the principal or dominant object of the legislation.

That principal object should be identified as such in the legislation, the achievement of which is to be supported by the other objects, including public trust and confidence.

#### **Recommendation**

Red Cross recommends that s15-5(1) of the ACNC Act be amended to provide this hierarchy of objects of the legislation.

## Additional objects

The ACNC's submission has recommended adding the following objects to s15-5 (1):

- “(a) To promote the effective use of the resources of not-for-profit entities; and
- (b) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.”

These additional objects are modelled along the lines of the objectives of the Charity Commission for England and Wales, originally introduced in 2006<sup>1</sup> and restated in the consolidation of charity legislation in 2011.<sup>2</sup>

Red Cross supports the ACNC's submission in this respect in principle, **subject to** the caveats set out below.

- The current objects are sufficiently broad to cover the current regulatory activities of the ACNC.
- Consequently, the additional objects proposed by ACNC must be expressed as objects which are to support achievement of the current objects. It is not sufficient that the additional objects are 'worthy' or 'admirable' in themselves.
- There are opportunities for concurrent regulatory reform arising from the review of the ACNC legislation. Ideally, any changes should be made only as part of a package of regulatory reforms which have the net effect of reducing, or at least overall not adding to, the net regulatory burdens on the sector.
- If some changes add to regulatory requirements (as is implicit in the addition of the two proposed further objects), then the opportunity should be taken to remove other regulatory requirements which duplicate matters covered by the new arrangements or which are otherwise excessive or unnecessary.

Some options for consideration in a package of regulatory reforms are discussed further in response to Question 8.

## **Recommendations**

Red Cross recommends that:

- if the ACNC objects are expanded as proposed by the ACNC, any additional objects in s15-5 (1) should be made subject to and in support of the recommendation above that the overriding and principal object be identified as the object set out in paragraph (b) of s15-5 (1);
- any changes to the objects should be made as part of a package of reforms which have the net effect of reducing, or at least not adding to, the net regulatory burdens on the charitable sector. (Some options in this regard are set out in response to Question 8.)

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<sup>1</sup> Section 7, Charities Act 2006 (UK).

<sup>2</sup> Section 14, Charities Act 2011 (UK).

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

No. Indeed, there remain significant regulatory overlaps between the ACNC framework and other Commonwealth, State and Territory regulatory frameworks. These are considered in response to Question 8.

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

Red Cross does not have a view regarding expansion of regulation to include the non-charitable not-for-profit (NFP) sector.

However, we note that the non-charitable NFP sector is approximately 10 times the size of the charitable sector (measured by the number of organisations) and includes a much broader variety of entities than charities, including industry organisations, political bodies, unions and policy bodies.

Accordingly, our concerns are twofold:

- First, if the framework is extended to cover non-charitable NFP organisations, the broader coverage of regulatory functions of the ACNC must not result in a dilution of focus of the ACNC in relation to the charitable sector.
- Secondly, any broadening of the focus and regulatory coverage of the ACNC to include non-charitable NFPs should not adversely affect the good working relationship and trust between the charitable sector and the regulator.

A way to achieve this would be to quarantine the regulatory oversight of the charitable sector within ACNC from the oversight of other not-for-profits (for example, by establishing a separate 'Charities Commissioner' within the ACNC, with unique oversight of the charitable sector).

**Recommendations**

If the regulatory framework is to be extended to non-charitable NFPs, then Red Cross recommends that:

- funding arrangements for the ACNC in respect of the charitable NFP sector should be maintained;
- a separate 'Charities Commissioner' be provided within the ACNC.

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

The recent *ACNC Public Trust and Confidence in Australian Charities Report 2017* lists six key factors determining public trust in charities, including:

- worthiness of the cause,
- knowing a high proportion of funds go to those in need,
- belief in the charitable cause,

- information provided by charities on how funds are spent,
- the excellent reputation of the charity, and
- that the charity is well-known.<sup>3</sup>

Activities or behaviours that degrade the public's perception of these factors are therefore most likely to have the greatest impact. This may include specific examples of serious illegality (including alleged misapplication of charitable funds<sup>4</sup> or failures of charity governance in response to allegations of illegality<sup>5</sup>), misrepresentation to donors, and inefficiency or waste by charities that are brought to the attention of the public.

The law already provides for regulation of these activities through the ACNC's Governance Standards, and the Australian Consumer Law and State and Territory fundraising laws.<sup>6</sup>

Accordingly, we do not believe there is case to be made for greater overall regulation of the sector – rather proper enforcement of existing law if, and to the extent, that is not already occurring.

This may however be supported by limited and focussed changes in reporting requirements which we consider in our response to Question 5, which are designed to reinforce the key factors which determine public trust in charities as set out above.

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

As a matter of principle, Red Cross is committed to and supports efforts which encourage transparency and accountability provided such measures are proportionate, effective and fair.

This submission focuses on two aspects:

- disclosure by charities, typically through the Annual Information Statements; and
- disclosure by the ACNC, in particular regarding investigations and regulatory decisions.

Disclosure by Charities

Red Cross supports measures that get the balance right between transparency for stakeholders (including donors, supporters, beneficiaries and the public) and the regulatory burden.

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<sup>3</sup> Kantar Public, 'ACNC Public Trust and Confidence in Australian Charities Report 2017: Market Research Report (October 2017)', Para 6.2 ([http://www.acnc.gov.au/ACNC/Publications/Reports/Public\\_Trust\\_2017.aspx](http://www.acnc.gov.au/ACNC/Publications/Reports/Public_Trust_2017.aspx)).

<sup>4</sup> For example, the recent findings of the NSW 'Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited' (January 2018).

<sup>5</sup> For example, the recent media coverage in the UK in response to Oxfam GB's response to allegations of serious misconduct in Haiti in 2011 and elsewhere

<sup>6</sup> Cf s18 The Australian Consumer Law (Cth) (discussed in the CAANZ 'A guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers'); Section 20(1), Charitable Fundraising Act 1991 (NSW); Section 7, Fundraising Act 1998 (Vic); Regulation 41, Collections Regulation 2008 (Qld); Section 15D, Collections for Charitable Purpose Act 1939 (SA); Section 12, Collections for Charities Act 2001 (Tas); and Section 18, Charitable Collections Act (ACT).

To be effective, the principles which govern regulatory controls and standards for reporting should be stated expressly and should:

- be clear and apply uniformly;
- focus on the specific and reasonable requirements of charities and their stakeholders, to ensure that disclosure of how funds are used and how charities are making impact, is accessible and meaningful to various stakeholders (including donors, supporters, beneficiaries and the public);
- be proportionate and not excessive or oppressive;
- not unnecessarily divert excessive charitable resources to reporting; and
- enable fair and reasonable comparators.

Red Cross believes significant work is required to design a reporting system that might achieve these objectives for the following reasons:

- a. Transparency without meaningful comparability is likely to be ineffective or even misleading.

For example, the comparative costs of poverty relief programmes in remote and regional Australia are vastly different from the costs of comparable programmes in certain overseas developing countries. A simple 'transparent' comparison is likely to be very misleading in that case.

Social changes to reduce or overcome vulnerability can be accomplished in various ways, which can blur the line between traditional notions of administrative costs compared to costs associated with service delivery.

- b. Stakeholders in the charitable sector vary significantly and 'one-size-fits-all' approach is unlikely to meet all needs or, instead, will create inefficiency by requiring additional reporting that may be relevant to certain stakeholders and not others.

Contrary to common perceptions, the vast bulk of charitable revenue is not sourced from individual public donors, but rather from Government, large private donors, membership fees, 'commercial' activities and investments. The recent ***Australian Charities Report 2016*** determined that public donations and bequests comprised only 7.2% of total charity revenue in 2016 (compared with 43% attributable to government grants).<sup>7</sup>

Measures strengthening greater transparency must take into account the fact that the vast majority of charity revenue is received from entities (such as corporate supporters and philanthropic trusts) who are already able to mandate the level and form of disclosure necessary to suit their particular needs.

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<sup>7</sup> Powell, A, Cortis, N, Ramia, I and Marjolin, A (2017) Australian Charities Report 2016. Centre for Social Impact and Social Policy Research Centre, UNSW Australia, page 53 (available here: <http://australiancharities.acnc.gov.au/wp-content/uploads/2017/12/Australian-Charities-Report-2016-FINAL-20171203.pdf>).

## **Recommendation:**

Red Cross recommends that further work be undertaken in this area in consultation with the charitable sector before regulatory changes are made.

We suggest that the approach and recommendations set out in AASB Discussion Paper (November 2017) “Improving Financial Reporting for Australian Charities” provide a useful way forward.

### Disclosure by the ACNC

In the context of regulatory actions, including investigations and decisions, transparency must be balanced with the need to not unfairly diminish the public reputation of individual charities or the charitable sector more broadly.

Red Cross supports the position that the ACNC is subject to the current secrecy provisions of the ACNC Act - pending a final decision being made by ACNC arising from an investigation. This affords a charity under investigation appropriate natural justice and preserves a charity’s reputation, pending the outcome of the investigation.

Once a decision is made, Red Cross supports a requirement that the ACNC provide reasons for its decisions publicly, unless – and only for so long as – it is in the public interest not to make public disclosure.

We understand from the UK, where the Charity Commission for England and Wales does provide reasons for its decisions, that this has allowed the UK House of Lords to review the decisions of the Commission and debate reforms on an informed basis.

## **Recommendation**

Red Cross recommends that, if the current secrecy provisions are amended, then Subdivision 150-C of the ACNC Act should be amended to:

- ensure the secrecy of an investigation should be maintained until a final decision has been made arising from the investigation; and
- require ACNC to provide reasons for decisions publicly, unless it is the public interest not to do so.

### **6. 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?**

Yes.

### **7. 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?**

The ACNC Commissioner has the right powers to address the risk of misconduct by charities and not-for-profits.



The ACNC Commissioner has very extensive powers under the ACNC Act, including:

- the power to compel registered entities to provide information (Section 60-75) and to provide documents (Division 70);
- extensive monitoring powers, including rights of entry and to execute warrants (Division 75);
- powers to issue warnings (Division 80) and give enforceable directions (Division 85), including directions which would otherwise not be permitted under the registered entities governing rules or in breach of contract (Section 85-15);
- powers to seek and accept enforceable undertakings (Division 90);
- powers to seek injunctions (Division 95); and
- powers to suspend, remove, and replace responsible entities (Division 100), including the right to direct the activities of an acting responsible entity (Section 100-60).

These powers are comparable with the powers of other federal regulators such as the ACCC and ASIC.

We do not believe a regulator of the charitable sector needs or ought to require greater powers.

### **Recommendation**

Red Cross recommends that no changes be made to the powers of the ACNC.

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

Yes, the ACNC legislation has been successful in reducing duplicative reporting burdens on charities.

As noted above, the ACNC register has resulted in a significant reduction in red-tape for charities fundraising in SA and the ACT, as the fundraising regulators in those jurisdictions have accepted that ACNC registered charities will have an automatic or fast-tracked approval process to obtain permission to fundraise.

This is an important first step in the right direction – but further work is needed.

In particular:

- **Fundraising laws**  
Current State and Territory fundraising laws are broadly acknowledged as in need of significant reform and replacement with a national, uniform and proportionate scheme.

The recent 'Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited' recommended that "consideration be given to the introduction of a single, unified Australian statutory regime for the regulation of charitable fundraising" but

cautioned that “if there is to be a unified model across Australia, then this would require extensive consultation between the States, the Territories and the Commonwealth”.<sup>8</sup>

Red Cross strongly believes that this is an area for the ACNC to perform a useful leadership and coordination role.

- **Income Tax exemption special conditions**

Section 50-50(2) of the *Income Tax Assessment Act 1997* (Cth) affords the ATO a regulatory oversight function in determining whether an income tax exempt charity has complied with all the substantive requirements in its governing rules and has applied its income and assets solely towards the purposes for which it is established.

These functions overlap with the regulatory functions of the ACNC.

Red Cross supports the detailed and convincing submission of the Law Council of October 2016 calling for the repeal of the relevant income tax exemption special conditions.<sup>9</sup>

- **State & Territory charitable tax concessions**

Red Cross supports harmonisation of State and Territory tax concessions for charitable organisations, with the framework and definitions provided under the *Charities Act 2013* (Cth).

- **Grant conditions**

Red Cross supports the streamlining of the numerous conditions imposed by Government and its agencies in grant agreements which place unfair or excessive burdens on the sector.

### **Recommendation**

Red Cross recommends that consideration be given to the identified areas of current regulation, with the objective of removing unnecessary regulation and harmonising relevant State and Territory laws.

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

Yes.

Accordingly, we urge caution before any material changes to the ACNC Acts in these respects are made.

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<sup>8</sup> NSW 'Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited' (January 2018), paragraphs 13.2.24, 13.2.53, and 14.8-14.9.

<sup>9</sup> Law Council of Australia, Submission to Treasury on the Tax Laws Amendment (2013 Measures No. 2) Act 2013, 19 October 2016.