



# Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation.

## Joint Submission – Councils of Social Service (COSS) Network

### About the Australian Councils of Social Service

The nine Councils of Social Service (COSSes) are the respective National, State and Territory peak bodies of the community services sector and a voice for the needs of people affected by poverty and inequality.

The Councils are:

- The Australian Council of Social Service (ACOSS)
- The Australian Capital Territory Council of Social Service (ACTCOSS)
- The Council of Social Service of New South Wales (NCOSS)
- The Northern Territory Council of Social Service (NTCOSS)
- The Queensland Council of Social Service (QCOSS)
- The South Australian Council of Social Service (SACOSS)
- The Tasmanian Council of Social Service (TasCOSS)
- The Victorian Council of Social Service (VCOSS)
- The Western Australian Council of Social Service (WACOSS)

The National COSS (Councils of Social Service) Network is working towards a just, inclusive and sustainable Australia where everyone can exercise their inalienable human rights, has equal access to resources and opportunities to participate in and benefit from social and economic life.

This submission has been prepared for the COSS Network by ACOSS. It has been authorised by the Chief Executive Officer of each Council.



## Summary

The establishment of a national regulator for the community sector has long been championed by the COSS Network. We welcomed the Government's commitment to this reform in 2011, the establishment of the Australian Charities and Not-for-profits Commission (the ACNC), and the Government's recommitment to the regulator in 2016.

The COSS Network considers that the ACNC and the *Australian Charities and Not-for-profits Commission Act 2012* (the ACNC Act) are performing well, and the approach taken by the ACNC to the performance of its regulatory functions over the past five years should form the basis of the approach going forward.

The COSS Network has reviewed the ACNC's submission to this enquiry, and largely agrees with the recommendations. That said, there are two recommendations that cannot be supported and should not be proceeded with. Recommendations that should be rejected include the proposal to expand the objects of the Act to include new objects, and to amend the secrecy protections at Subdivision 150C for organisations that are under investigation by the ACNC.

Independence is a core principle of the NFP sector. This principle must be applied in terms preserving the sector's diversity of structure, governance arrangements and activities, in particular public advocacy. To better protect the independence of the not for profit (NFP) sector we suggest an amendment to the ACNC Act to introduce the concept of the independence of the sector.

## Recommendations

- 1. The approach taken by the ACNC to the performance of its regulatory functions over the past five years should form the basis of the approach going forward.**
- 2. Retain the current objects of the Act, and reject the ACNC's proposal to insert new objects.**
- 3. Retain the secrecy protections at Subdivision 150C for organisations that are under investigation by the ACNC.**
- 4. Make an amendment to the Act to insert the concept of the "Independence of the NFP Sector".**



## History of the ACNC and COSS Network engagement

The concerns regarding appropriate regulation of the NFP sector have been the subject of debate for more than two decades. Key forums where the regulation of the charities and NFP sector has been considered included the Senate Standing Committee on Economics in 2001, the National Roundtable of Non-profit Organisations in 2004 and the Senate Standing Committee on Economics, Disclosure regimes for charities and NFP organisations in 2008. These concerns culminated in commissioning the Productivity Commission to undertake a study into the contribution of the NFP sector in 2009.

Given the COSS Network's identification of effective national regulation for the NFP sector as a priority issue, we devoted significant time and effort into contributing to the Study and its outcomes. As part of this, the COSS Network conducted consultation across the community sector to support this work. The COSS Network contributed a number of submissions to the study, appeared at Senate Committee hearings on the matter, responded to draft legislative proposals and engaged with the ACNC when it was established. While there was significant commentary on what form effective national regulation should take, the detail of the overarching and subordinate legislation, and discussion regarding the objects and activities of the national regulator, there was broad support for the recommendations of the Productivity Commission, which focused on a consistent regulatory approach for the NFP sector. Responding to these recommendations, the then Government announced in May 2011 that it would establish the Australian Charities and NFPs Commission as well as committing to reform the use of tax concessions by businesses run by NFPs, with the objective of 'better targeting of tax concessions'.

The Government also committed to introduce a statutory definition of 'charity', to replace the current 'outdated and uncertain' definition and to assist the sector through greater consistency. The COSS Network welcomed the package of reforms outlined by the Government and, as previously noted, devoted significant resources to enable our engagement to the process around the rollout of these reforms. After the initial announcement, the COSS Network and others across the sector worked consistently in response to draft legislation on the establishment of the ACNC. Initial proposals were considered, and the COSS Network continued to raise questions around threshold issues such as independence, proportionality and the relationship with other key bodies such as the Australian Taxation Office.

When the Government proposed the abolition of the ACNC in 2014, the COSS Network and others advocated strongly for its retention. The Government ultimately agreed and announced in 2016 that the ACNC would continue to operate.

The COSS Network is represented by ACOSS on the Commission's Sector Users Group. Via this forum, ACOSS contributes to discussions relating to the effective operation of the Commission, and provides input and advice to the Commission on the performance of its regulatory functions.

## The ACNC and the ACNC Act are performing well

The COSS Network considers that the ACNC and the ACNC Act are performing well, and the approach taken by the ACNC to the performance of its regulatory functions over the past five years should form the basis of the approach going forward.

The ACNC has promoted confidence in the sector, through its visible deregistration of organisations that have not met their relevant reporting or other responsibilities. These visible regulatory interventions demonstrate that improper practices will not be tolerated. We note that the number of charities de-registered has increased since the creation of the ACNC, however we also note that the approach taken by the ACNC is educative in the first instance.

COSS Network members report that the ACNC's approach to customer service is excellent, and compares favourably to the period when the functions were performed by other agencies. Members report that making contact, resolving queries and addressing issues are all simple propositions, and demonstrate that the ACNC is performing these functions well. The staff of the ACNC are both knowledgeable and helpful. In addition, the information provided by the ACNC as part of its educative function is useful, well written and supported by the COSS Network membership.

We note also the ACNC's efforts to reduce red tape across the sector. While the COSS Network considers that the achievement of red tape reduction across the sector has been too slow, the efforts of the ACNC in pursuing those reductions are not the impediment, and these efforts have borne fruit in several jurisdictions. For example, the South Australian Government used the establishment of the ACNC registration and reporting framework to abolish the need for separate annual reports to the state regulator, and to abolish the need for a separate fundraising licence for ACNC registered charities. This speaks of a high level of confidence in the ACNC regulatory regime and resulted in useful red tape reduction for our sector. By contrast, in the Northern Territory we note that organisations incorporated under the NT Associations Act are required to report both to the Department of Business and the ACNC – effectively increasing the red tape in this jurisdiction. We are confident that further efforts in the years ahead will continue to result in reductions in red tape for charities regulated by the ACNC.

**RECOMMENDATION 1** – *The approach taken by the ACNC to the performance of its regulatory functions over the past five years should form the basis of the approach going forward.*

## The ACNC's submission should be supported, with some exceptions.

The COSS Network has reviewed the ACNC's submission to this enquiry, and largely agrees with the recommendations. That said, there are two recommendations that cannot be supported and should be rejected. Recommendations that should be rejected include:

### 1. The recommendation to amend the objects of the Act to add two further objects, namely:

- (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.

The ACNC makes little if any argument in support of these additional objects. The COSS Network considers their addition to the Act to be unwise. It is not the role of the regulator to oversee the effective use of resources by charities and not-for-profits entities. These decisions and assessments are best made by organisations and their governing bodies in consultation with their donors and beneficiaries. The regulator has neither the imperative nor the resources to undertake this analysis and this change in focus would distract from the regulators other important functions. Without significant additional resources to measure effectiveness, the ACNC could be reduced to judging charities on the basis of administrative or ‘back office’ costs or another crude indicator. We note that ‘effective’ is not defined in the proposed new objects, and is therefore amenable to various interpretations. This would introduce an unhelpful element of uncertainty into the Act.

**RECOMMENDATION 2** – *Retain the current objects of the Act, and reject the ACNC’s proposal to insert new objects.*

## 2. The Secrecy Provisions

The ACNC has recommended that the secrecy provisions be amended to allow the Commissioner discretion to publish ACNC information, make public comment on a range of matters, enable data sharing to facilitate data matching, research or red tape reduction, and proposes changes on how and when protected. These changes are largely uncontroversial, and are supported by the COSS Network. However, the proposal to amend Subdivision 150C of the ACNC Act to provide that ACNC officers are authorised to disclose protected ACNC information for the purpose of making a public comment or publishing information about the Commissioner’s regulatory activities when it is in the public interest to do so is considered problematic. The ACNC indicates that specifically, this recommendation is focused on allowing the ACNC to confirm that an investigation has been commenced, disclose action that the ACNC has taken or is proposing to take in relation to a registered charity or a responsible person and disclose a regulatory outcome (e.g. that the ACNC and a registered charity have entered into a compliance agreement or that the ACNC has provided regulatory guidance to a registered charity).

The provisions of Subdivision 150C are an important protection for charities that are under investigation. They contribute to ensuring natural justice and procedural fairness for an organisation under investigation, and ensure that their reputation is preserved until an outcome has been determined. The COSS Network considers that these provisions should be preserved so as to ensure that investigations remain confidential until they are concluded.

**RECOMMENDATION 3** – Retain the secrecy protections at 150C for organisations that are under investigation by the ACNC

**There are minor changes to the Act that would improve its operation, including by inserting a clause that ensures the independence of the NFP sector,**

Independence is a core principle of the NFP sector. Independence of the sector is acknowledged both in the objects of the ACNC Act and in the former Assistant Treasurer, David Bradbury’s second reading of the Act, in which he states that:

*“The government is dedicated to supporting a strong, vibrant, diverse and independent NFP sector. We believe that a new national regulator must protect this independence, which allows NFP entities to make their own decisions on how to best meet their mission without undue influence and control from the Commonwealth Government and its agencies.”*

This principle must be applied in terms preserving the sector’s diversity of structure, governance arrangements and activities, in particular public advocacy. Preserving the independence of NFP entities can be challenging where, typically, a Government monopsony exists. The Government monopsony in social service delivery limits the capacity of NFP entities to conduct genuine contract negotiations with the Government. This has led to both an increase in the reporting and administrative obligations placed on NFP entities as well as terms and conditions which have limited the capacity of entities to undertake advocacy (commonly referred to as a “gag” clauses).

To better protect the independence of the NFP sector we suggest an amendment to the ACNC Act with wording to the following effect:

*Subdivision 205-C – Other concepts*

*Insert 205-41 Independence of the NFP Sector:*

*Independence of the sector means that NFP entities are autonomous entities subject to the direction and control of their Boards or Governance body(ies). The independence of an NFP entity, including in relation to advocacy, cannot be set aside, limited or controlled by condition of direct or indirect Government funding.*

**RECOMMENDATION 4** – Make an amendment to the Act to insert the concept of the “Independence of the NFP Sector”