



Australian Government



Australian
Charities and
Not-for-profits
Commission

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Our ref: EXT2013/30



Dr Janine Bush
Executive Officer
Family and Community Development Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Dr Bush

Inquiry into the Handling of Child Abuse by Religious and Other Organisations (Parliament of Victoria, Family and Community Development Committee)

The Australian Charities and Not-for-profits Commission (ACNC) welcomes the invitation by the Inquiry into the Handling of Child Abuse by Religious and Other Organisations (the Inquiry) to make a formal submission. We do not comment on any individual cases or the evidence before the Inquiry.

This submission sets out the background to the ACNC, its current role (and existing limitations of that role) including its scope and powers, before turning to the specific role the ACNC does and might play in relation to the matters being considered by the Inquiry.

1 Background to the ACNC

1.1 Objects

The ACNC was established on 3 December 2012 under the Australian Charities and Not-for-profits Commission Act 2012 (Cth) (the ACNC Act).

The ACNC is the independent national regulator of charities. It has been established to achieve the following objects:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector through increased accountability and transparency
- support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector

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- promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

1.2 Why was the ACNC established?

The ACNC was established on the recommendation of a number of reports, including the independent Inquiry into the 'Definition of Charity and related Organisations' (2001), the Senate Standing Committee on Economics' Inquiry into the 'Disclosure Regimes for Charities and Not-for-profit Organisations' (2008), and the Australian Productivity Commission's major research report into the 'Contribution of the Not-for-profit Sector' (2010).

The establishment of the ACNC was also supported by key charitable and peak organisations, including the Australian Council for Social Service, the Community Council of Australia, the Not-for-profit Reform Council, and the National Roundtable for Nonprofit Organisations.

In the past, charities have been regulated by a patchwork of different regulators (for example, State-based consumer affairs bodies for incorporated associations, and State Attorneys-General for charitable trusts). The Productivity Commission report stated that the framework was 'complex, lacks coherence, sufficient transparency, and is costly for NFPs'.

A distinctive feature of charities is that their purpose is to fulfil a mission for the public benefit, but there has been no effective mechanism of accountability to ensure that charities remain committed to, and engaged in furthering, that (charitable) mission. The ACNC is designed to fill this gap, following the model of specialist charity regulators in the United Kingdom and Singapore.

On the other hand, many charities face a significant regulatory burden – both in terms of duplication and complexity. This is particularly so if they receive funding from multiple levels of government and/or from multiple government agencies, as is often the case for social welfare providers. Under its statutory objects, the ACNC is also charged with reducing these unnecessary regulatory obligations.

1.3 Who is registered under the ACNC?

Although the objects of the ACNC Act relate to not-for-profits, the ACNC will initially only regulate charities (within the meaning used by the law). The legal meaning of charity is broader than the popular understanding and relevantly includes organisations that advance religion (such as churches) and education, as well as community and social welfare.

Although registration with the ACNC is free and voluntary, charities must be registered if they want to access concessions under Commonwealth law, including charity tax concessions and other benefits.

Charities previously endorsed by the Australian Taxation Office for charity tax concessions have been automatically registered with the ACNC. As of 27 May 2013, there are over 57,000 charities registered with the ACNC, with 470 of these registered by the ACNC since its establishment.

1.4 What the ACNC regulates

There are three main situations where the ACNC has powers:

- when a charity does not meet its obligations under the ACNC Act to report to us or keep proper records
- when a charity does not meet minimum standards of governance (for example, where those responsible for a charity are not taking reasonable care or not managing conflicts of interest)
- when an organisation is not, or is no longer, a charity (for example, where it is being used to make a profit for private individuals or is set up for illegal or improper purposes).

The ACNC's powers in relation to standards of minimum governance depend upon Regulations currently before the Parliament of Australia that set out these 'governance standards' (these are set out in Appendix 1). The Regulations are expected to commence on 1 July 2013, subject to disallowance by the Parliament.

The governance standards, and other legal limits on the scope of our powers, are discussed further below.

1.5 What the ACNC does not regulate

The ACNC does not:

- assess the effectiveness of a charity in meeting its objectives unless it is evidence to support a conclusion that the organisation is a sham or not acting for the public benefit
- become involved in internal differences of opinion or employment disputes that do not relate to governance
- regulate the service quality of charities, although there may be times that service quality is relevant to our investigations.

In relation to churches specifically, the ACNC does not involve itself in pastoral, spiritual, liturgical or canonical matters.

1.6 Regulatory approach

The ACNC has published a detailed statement on its regulatory approach (see Appendix 2), following a major public consultation. The core elements of that approach are:

- the foundation of the ACNC's regulatory approach is an understanding of charities, their purpose of benefiting the public, and their contribution to our society in vital and diverse ways
- the ACNC will use its powers in a way that reflects both the risks and the evidence before us

- the ACNC begins by assuming that people involved in charities are acting honestly and uses the least intrusive powers that are sufficient to address those concerns.

However, the ACNC will act firmly and quickly in cases where gross negligence or serious misconduct has been established, or where vulnerable people or significant charitable assets are at risk.

The ACNC considers the following factors in making its decisions and exercising its powers:

- the type of problem
- what or who is at risk (for example, whether it affects people, money or public trust and confidence generally)
- nature and degree of potential harm
- likelihood and frequency of occurrence or recurrence
- risk profile of the charity (for example, the size of a charity, the existence of accountability mechanisms, its history of compliance and cooperation), and
- the behaviour of those responsible for the charity.

1.7 Powers

Under the ACNC's regulatory approach, there is an emphasis on educating and supporting charities to fulfil their mission. Advice, education and guidance are a crucial part of the ACNC's informal powers to address concerns (forming the bottom layer of our regulatory pyramid, as set out in Appendix 2).

The ACNC also has a range of formal powers under its Act, including:

- administrative penalties for late reports or notifications and for false or misleading statements under the ACNC Act
- warnings (formal) where a charity is not complying with its obligations
- enforceable undertakings (voluntary agreements with charities for them to take or stop actions that would breach our Act or Regulations which, if breached, can be enforced by a court)
- directions to a charity to act, or stop acting, in a certain way to make sure they comply with the law
- applying for injunctions to a court (to order a person to do, or not do, something to make sure they comply with the law)
- suspending and removing (except in the case of 'basic religious charities', discussed further below) members of a charity's governing body who has breached our Act or Regulations

- revoking registration, which results in loss of entitlement to charitable status under Commonwealth law, including access to charity tax concessions.

2 The ACNC's role in relation to the matters heard by the Inquiry

As the Commonwealth regulator of charities (as explained earlier), the ACNC regulates the great majority of religious and non-governmental organisations which are the subject of the Inquiry. If an organisation wishes to access Commonwealth charity tax and other concessions it must be registered with the ACNC. However, as stated above:

- in relation to churches specifically, the ACNC does not involve itself in pastoral, spiritual, liturgical or canonical matters
- the ACNC does not administer child protection legislation or deal with incidents of actual abuse.

The ACNC's aim is to promote public trust and confidence in charities, including by ensuring that those responsible for governing the charity comply with their legal duties and responsibilities in managing their charity. These legal duties include the duty to protect the charity and its beneficiaries from harm.

The role of the ACNC in these cases therefore is to examine the governance of the charity, such as considering the policies and processes involved in preventing and responding to abuse.

This is a distinct role that is separate from the role of the police in investigating specific allegations of abuse, or the role of child protection in safeguarding the welfare of vulnerable adults and children.

The ACNC may have legislative power to consider action if, by allowing the criminal abuse of children in its care:

- the charity committed a serious offence or serious breach of a law that would result in a breach of the pending governance standards
- a person responsible for governing the charity had breached their duty of care to the charity (including its beneficiaries) as required under the common law, statute and the pending governance standards
- the degree and extent of the harm caused meant that the charity would no longer be for the 'public benefit', as required under the legal definition of charity.

The ACNC accepts complaints from the public (including anonymous complaints) in relation to charities. If an investigation is warranted, the ACNC can require information from the charity and other people, and can attend the premises or other relevant sites of a charity to observe activities and to inspect and copy relevant documents either by consent, or after applying for a monitoring warrant. The ACNC could then decide to use any of the formal powers listed above, although there are important limits discussed below.

The ACNC has a clear role in addressing issues of governance and ensuring compliance. It can investigate failings, consider systemic issues and respond through education or

enforcement, as appropriate. This includes where there are failings that have led to harm of children and vulnerable adults.

2.1 Limits to the ACNC's potential role

Under the ACNC Act, there are, however, a number of legal limits to the ACNC's regulatory role that may limit the effectiveness of the ACNC in addressing the matters being considered by the Inquiry. These include:

- limits in relation to 'basic religious charities'
- limits in relation to charities which are not 'federally regulated entities'
- limits in relation to charities that are not registered with the ACNC, and
- the possibility that the governance standards will not come into effect on 1 July 2013.

These legislative and constitutional limits are discussed further below. There are also operational limits to the ACNC's regulatory role, such as the number of compliance staff and the funding given to the ACNC.

2.1.1. 'Basic religious charities'

A 'basic religious charity' is defined in section 205-35 of the ACNC Act. A basic religious charity is a registered charity that meets all of the following requirements:

- it is registered for a purpose that is the advancement of religion
- it could not be registered as any other subtype of charity (for example, under education)
- it is not a body corporate registered under general incorporations legislation named in that section (for example, incorporated associations legislation)
- it is not endorsed as a deductible gift recipient (DGR) itself (however it can be endorsed to operate DGR funds, institutions or authorities as long as their total revenue is less than \$250 000 for the particular financial year)
- the ACNC has not allowed it to report as part of a group, and
- it has not received more than \$100 000 in government grants in the current financial year or either of the previous two financial years.

Under the ACNC Act, basic religious charities (unlike other charities):

- do not have to provide annual financial reports (but do have to provide annual information statements)
- do not have to comply with the pending governance standards, and
- cannot have a person on their governing body suspended or removed.

The result of the definition of 'basic religious charity' is that, in cases of criminal abuse involving religious congregations or other purely religious organisations, that are not corporate structures, the ACNC could not rely on a breach of the governance standards to justify an investigation and could not suspend or remove a person on the governing body found to be in breach of those obligations.

The ACNC could, however, consider evidence of whether the harm caused by the congregation is such that it is no longer for the 'public benefit', and could revoke the registration of a religious congregation (including its access to tax concessions) in that event. However, this is a more difficult route than if the governance standards applied to such charities.

2.1.2. Federally regulated entities

The ACNC Act generally limits the ACNC's enforcement powers (other than that of revoking registration) to 'federally regulated entities'. This is defined in section 205-15 and reflects the Commonwealth's constitutional powers. The definition includes:

- a constitutional corporation (being a trading, financial or foreign corporation, or a body corporate incorporated in a Territory)
- a trust, all of the trustees of which are constitutional corporations (which will include trusts managed by trustee companies, and many ancillary funds)
- a body corporate taken to be registered in a Territory under section 119A of the Corporations Act
- a trust governed by the law of a Territory, or
- a charity where the core or routine activities are carried out in or in connection with a Territory.

A 'constitutional corporation' is not the same as a company regulated by the Commonwealth. Whether a corporation is a 'trading' corporation depends on its substantive activities, and there is legal debate about the breadth of the term 'trading' corporation in this context. However, it is unlikely that it would capture many purely religious organisations, and it may not capture all non-governmental organisations providing services to children.

The result of this limit is that the ACNC will be unable to adapt its graduated regulatory approach without the cooperation of the charity under investigation. The ACNC would have to rely on its power to revoke registration in the absence of the cooperation or consent of the charity.

The ACNC observes that this provision reflects current understanding of the Commonwealth's constitutional powers, in the absence of any referral of powers by the States in this field. The ACNC notes that, if the States were to refer its powers in relation to charities specifically in relation to the ACNC Act, this would significantly increase the effectiveness of the ACNC's role in relation to the matters being considered by this Inquiry.

2.1.3. Registered charities

While registration with the ACNC is voluntary, the fact that registration is necessary to access Commonwealth tax concessions means that it is likely most non-governmental organisations relevant to the Inquiry are registered with the ACNC. Charities can choose to deregister, but after a transitional period that ends on 2 June 2013, the ACNC has the discretion to refuse an application for deregistration.

However, there remains a risk that a charity that is involved in instances of criminal abuse of children may not be subject to the ACNC's jurisdiction because they have opted not to register (and to forgo their access to Commonwealth charity tax concessions). Commonwealth tax concessions, while important for many organisations, are less relevant to organisations that do not have significant income.

As well, the ACNC legislation includes as a requirement across a range of Commonwealth legislation the registration of an organisation with the ACNC. If State legislation required organisations to be registered with the ACNC in order to access State tax concessions or other benefits, this would enhance the effectiveness of the ACNC's regulation.

2.1.4. Governance standards

The Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1), which sets out the minimum governance standards with which charities must comply, was tabled in Parliament on 12 March 2013.

Although the Australian Government expects that the Regulation will commence on 1 July 2013, there is a risk that the governance standards may be disallowed by Parliament. If the governance standards do not commence, the ACNC's powers in relation to dealing with child abuse will be significantly curtailed. As discussed above, the ACNC would then have to justify investigation on the basis of the organisation's charitable status – namely, insufficient 'public benefit' – which raises the threshold for investigation.

3 Conclusion

The ACNC has been established to promote public trust and confidence in charities by ensuring the accountability of charities in relation to their mission (and, therefore, its beneficiaries), and by ensuring that charities meet a minimum standard of governance.

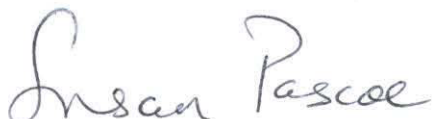
As noted above, the ACNC was not established due to a particular scandal. Nevertheless, the ACNC observes that the matters being considered by the Inquiry demonstrate the need for a regulator such as the ACNC.

There has been some public comment in relation to this Inquiry that there is no mechanism to enforce the accountability and governance of charities. In fact, the ACNC has been established precisely for these purposes, and therefore can play a useful role in addressing the systemic and procedural issues of organisations that fail to prevent or respond adequately to the criminal abuse of children.

As discussed above, there are some legislative limits to the potential role the ACNC can play. The ACNC notes that it can play a more effective role in any recommended regime for compliance and remedies if these limits were removed.

The ACNC welcomes the interest of the Committee in its role and work, and would be happy to discuss any of its details further if desired by the Committee.

Yours sincerely



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Appendix 1: Governance Standards

Appendix 2: ACNC Regulatory Approach Statement