



## ACNC and NFP Reform Consultation Papers, January 2012

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Thank you for the opportunity to comment on the following papers in support of the Australian Government NFP Sector Reform process:

- *Review of not-for-profit governance arrangements* consultation paper (**NFP Consultation Paper**).
- *Australian Charities and Not-for-Profit Commission (ACNC): Implementation design* consultation paper (**ACNC Consultation Paper**).
- *ACNC Exposure Legislation* (**Exposure Legislation**)

We have consolidated our response to these papers. This response articulates guiding principles which have framed our approach to the papers, and applies them to selected questions from the NFP Consultation Paper and ACNC Consultation Paper, and selected provisions of the Exposure Legislation.

### **About YWCA Australia**

YWCA Australia is the national association of YWCAs in Australia and is part of the World YWCA movement. We are a women-led organisation that achieves positive change by providing advocacy, programs and services for women, families and communities. YWCAs undertake advocacy and deliver services and programs that develop the leadership and collective power of women and girls, support individuals, their families and communities at critical times, and promote gender equality and community strengthening. YWCAs have been providing community services in Australia since the 1880s. Globally, YWCAs have committed to the operation of transparent and accountable governance and operational structures through the Standards of Good Governance and Accountability (**SGMAs**). The SGMAs, adopted in 2003, cover twelve areas, including purpose, responsibilities as a member association, finance, and governance. The SGMAs recognise our multiple accountabilities to members, communities and funders.

### **General support for the ACNC**

YWCA Australia is broadly supportive of the establishment of the ACNC. We welcome the commitment of the Australian Government to support the operation of the charity and NFP sectors through a regulatory framework that articulates high-level principles to guide our operations.

### **Process concerns**

YWCA Australia is concerned that the timetable for the establishment of the ACNC may undermine its capacity to operate effectively. For example, the sector has been asked to comment on legislation that does not contain provisions on the governance requirements for reporting bodies. We note that the sector's long-term advocacy in support of this reform agenda and would hate to see hurried process hamper the development of a constructive relationship between the ACNC and the sector from the outset.

### **Sector submissions**

We note that a number of colleagues have prepared useful submissions and we commend them to you, in particular the submissions from

- The University of Melbourne Law School’s Not-for-Profit Project (**NFP Project**)
- The Australian Council of Social Service (**ACOSS**)
- The Communities Council of Australia (**CCA**)
- Philanthropy Australia (**PA**)

## **Reframing the objects of the ACNC**

YWCA Australia endorses the position of The University of Melbourne Law School’s Not-for-Profit Project:

We discuss at some length in our [Regulatory Working Paper](#) the relevant regulatory aims and objectives in the context of the NFP sector. As we explain there, the ultimate goal of regulation of the sector is to facilitate the sector to fulfil, in diverse ways, its goals for the public or community benefit. The promotion of public trust and confidence, loyalty to mission, and enhancing the effectiveness of the sector are identified as second-order goals, followed by a third tier objectives which include ensuring transparency and accountability to donors, beneficiaries, other stakeholders, and the public.<sup>1</sup>

In our view the currently drafted objects of the Act do not enable such goals to be fulfilled. We support a redrafting of the objects to reflect the advice of the NFP Project.

## **Endorsing a principles-based approach to sector regulation**

YWCA Australia strongly endorses a principles-based approach to the establishment of the ACNC. We share the concerns of our colleagues in the sector who have identified that the Consultation Paper assumes a prescriptive approach which could lead to an overly complicated system of mandatory compliance practices. We are concerned that the approach outlined in the Consultation Papers could actually undermine effective governance practice by Boards. For example, a number of questions in the NFP Consultation Paper, (inter alia, 1, 2, 15) establish an expectation that the ACNC would be enforcing detailed governance requirements for the sector.

YWCA Australia advocates for an approach that operates at the level of principles. For example, in the context of advocacy on women’s leadership, YWCA Australia has welcomed amendments made to the *ASX Corporate Governance Principles and Recommendations* to provide guidance to companies on how to promote diversity in leadership. In our view the tenor of these guidelines could be used as a guide for the Government in determining its approach to the ACNC. To that end, we also note that the work of the Charities Commission of England and Wales, also provides a useful model for the development of a “guidelines” approach to sector regulation. We particularly welcome the ability of such an approach to respond to the diversity of the sector while also recognising the not inconsiderable governance expertise of the sector. In our view providing high-level guidance as to the key features of governing rules is fundamental to the development of a successful principles-based approach to the production of regulatory guidelines. We commend this approach to the Government and seek assurances that the Government will ensure that the sector is provided with an opportunity to comment on such draft guidelines.

We note our concern that the overly prescriptive approach foreshadowed through the discussion papers may actually reduce public confidence in the sector – suggesting that the sector has lacked effective governance and operational mechanisms in the past. In our over 130 years of in Australia

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<sup>1</sup> The University of Melbourne Law School’s Not-for-Profit Project, *Submission to the Treasury, Exposure Draft, Australian Charities and Not-for-Profits Commission Bill 2012*, January 2012, p15

we do not consider this to be the case and would be disappointed to see this as an outcome of the reform agenda.

## **Supporting streamlined and timely regulation and reporting**

YWCA Australia strongly endorses an approach that would enable the NFP and charity sector to report once to Government, and that this information would then be available across Government. For example, we presume that the *Charities Passport* will mean that we no longer have to fill out the “objects and purposes” sections of funding applications, that Departments would simply be able to refer to the *Charities Passport*. YWCA Australia also supports an end goal of the *Charities Passport* being accessible across all tiers of Australian Government.

We note that this ambitious but worthwhile reform requires careful planning and we are concerned that the timelines associated with the establishment of the ACNC may undermine the objective.

We note also the concurrent work being undertaken as a joint initiative of Commonwealth, State and Territory Governments into a National Regulatory System: Community Housing. Having participated in both reviews it is unclear to us what consideration has been given to the interaction of these two systems, and we are concerned that a failure to consider this will see the regulatory burden increase rather than decrease.

### *Specific feedback on NFP Governance Consultation Paper – reporting timelines*

We are concerned that the proposed reporting timelines established for entities reporting to the ACNC may be unrealistic. Many NFPs rely on pro bono or discounted auditing services – which means that we may not be able to meet the October reporting requirements suggested in the NFP Governance Consultation Paper.

### *Specific feedback on ACNC Consultation Paper – draft forms*

In the context of the ACNC Consultation Paper and the draft forms that have been developed we note with concern that it appears as if we will be required to manually enter data from our financial statements. We are concerned that this is inefficient. We are convinced that technology can be harnessed to enable this information to be harvested electronically from our financial statements. In relation to Forms A/B/C at question five can we clarify your intent? It seems to us that your intention should be to gather information on “main activities” over the next twelve months.

## **Advocating for comparable regulation**

As previously indicated, YWCA Australia strongly supports an approach to the establishment of the ACNC that will streamline the regulation of the sector. We are concerned that the approach in the Consultation Papers suggests a higher regulatory burden for the NFP sector than other sectors. For example, the questions on Director’s qualifications, risk management, and insurance not only foreshadow a prescriptive rather than principles-based approach, but they also seem to propose moving beyond current requirements of the *Corporations Act*. YWCA Australia does not support this approach.

In this context, YWCA Australia does not support an approach such as that outlined in question four of the NFP Governance Consultation Paper that there be different standards of care for employees and volunteers, professionals and lay people. Nor do we support the approach suggested at question five of the NFP Governance Consultation Paper that the ACNC should be regulating

whether board members have particular qualifications or experiences. These questions are absolutely the responsibility of the Board to consider, but would be better addressed through high-level guidance, such as the approach taken by the Charities Commission of England and Wales.

We also note the comprehensive advice provided in the NFP Project submission on Australia Constitutional provisions and legislation that ought to be considered in ensuring the effective operation of the ACNC and commend this information to the Government.

### **Seeking clarity of scope and applicable parties**

YWCA Australia is concerned that there is a lack of clarity in the current proposals as to which entities will be regulated by the ACNC. There is some confusion as to the application of the regulations to “charity” and “NFP” at present. We particularly commend the submission of Philanthropy Australia at paragraph A.<sup>2</sup>

### **Welcoming a tiered regulatory framework**

YWCA Australia commends the approach of a tiered regulatory framework. The tiered regulatory framework recognises the diversity of the sector, as exemplified within our own federation where our Members range in turnover of \$45,000 to \$20 million. We share the concerns raised by our colleagues at Philanthropy Australia that an organisation which is a deductible gift recipient (**DGR**) is automatically considered to be a Tier Two, medium sized entity, regardless of their revenue. We are concerned that this could create overly burdensome requirements for small organisations with DGR.

### **Supporting an expert and independent ACNC**

YWCA Australia strongly supports an expert and independent ACNC. We note in this regard the concerns of our colleagues at ACOSS on the functioning of the ACNC.

In relation to the Exposure Legislation we note our concern that the current provisions on the membership of the Advisory Board read as if members must have expertise relating to NFP entities (including charities) **and** experience and appropriate qualifications in relation to either law, taxation or accounting. In our view the Advisory Group will be weakened if it seeks only to draw its membership from a pool of lawyers and accountants. The requirement to have experience in the NFP sector, which of course includes experience in law, taxation and accounting, should stand alone as the only grounds required.

### **Recognising the diverse income base of the sector**

YWCA Australia notes that the Exposure Legislation at section 3-5 and titled “Guide” includes a list of funding sources for the NFP sector. In our view the list fails to reflect the diverse income base of the sector and should be amended to reflect income derived from the operation of businesses that enable us to support the delivery of our purpose. To this end, we note the ongoing inquiry into tax concessions for charities, and our concern that the regulatory framework support organisations such as the YWCA being able to continue to generate our own revenue from the businesses we operate.

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<sup>2</sup> Philanthropy Australia, *Philanthropy Australia response to Consultation Paper – Review of NFP Governance Arrangements and Exposure Draft ACNC Bill 2012*, Melbourne, 2012, p3.

## Definitions of Charity

While we understand that a separate process is being undertaken to address the definition of a charity, we take this opportunity to reiterate our views on this matter. YWCA Australia supports a definition of charity that embraces the following charitable purposes:

- the promotion of equality; in the case of the YWCA gender equality is a particular focus for our work. YWCA Australia supports the adoption of charitable purposes as set out in the recent revisions to the UK Charities Act 2011;
- the advancement of human rights: civil, cultural, economic, social and political; as well as conflict resolution, reconciliation, the promotion of religious or racial harmony, and diversity, as established in the UK Charities Act 2011;
- advocating on behalf of those the charity seeks to assist, or lobbying for changes in laws, policies and government decisions that have direct effects on a charity's main/predominant/dominant purpose, are recognised as a charitable purpose. Changes to the definition of charity should ensure that NFPs can provide both service delivery and advocacy to affect both individual and structural change without risking their status as a charity;
- the advancement of citizenship or community development – including the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities – which we would understand to include the role of peak bodies, as clarified in the the New South Wales Administrative Tribunal decision which establishes the circumstances when a peak body can be a charity. YWCA Australia supports the principle in the Administrative Tribunal decision that it is the degree of integration and commonality of purpose with its members that determines the charitable status of a peak body;
- the relief of those in need because of youth, gender, age, ill-health, disability – including through the provision of accommodation or care.

### Further information

Thank you for the opportunity to provide this submission.

For further information please contact:

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