

28 February 2018

Mr Murray Crowe
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: ACNCReview@treasury.gov.au

Dear Mr Crowe

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

Thank you for the opportunity to make this submission to the Review Panel.

The focus of our submission is what our members believe are gaps in the regulatory framework that prevents the objects of the Australian Charities and Not-for-profits Commission (ACNC) being met, including the impact this has on public trust and confidence in the charities and not-for-profits sector.

In particular, we wish to focus on legislative requirements and the powers of the ACNC Commissioner to address misconduct by charities and not-for-profits, and submit that greater transparency is required and additional powers are appropriate.

Introduction

Beyond PMSA represents more than 4,500 concerned parents, donors, past students and other stakeholders of Brisbane Boys' College, Clayfield College, Somerville House and Sunshine Coast Grammar School (Beyond PMSA Members). These four schools are owned and operated by the Presbyterian and Methodist Schools Association (PMSA) who have assets of approximately \$450 million and annual turnover approaching \$100 million. As of 2017, total enrolments were 4,815 students. The PMSA was formed under Letters Patent and despite the size of the organisation, remains beyond the reach of any regulator other than the ACNC.

Beyond PMSA was formed in response to serious concerns for a lack of governance, transparency and accountability that has led to the lives of many individuals, through no fault of their own, being severely disrupted or damaged in the long term.

Beyond PMSA is grateful for the opportunity to present this submission on behalf of our members, and we welcome the opportunity to be further involved in this process to improve the governance of charitable organisations across the board.

The majority of our submission is focused on the transparency and accountability through legislation and consideration of whether the powers and functions of the ACNC Commissioner are sufficient to enable the objects of the Act to be met, particularly the object “*to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector*”.

Our submission is based on our direct experience of dealing with the PMSA as owners and operators of the four schools mentioned, and in particular, the shortcomings of both legislative provisions and powers of the various regulators to intervene.

We note that due to the fact that we are a volunteer organisation, we have relied heavily on the submission of other organisations to support our views.

Executive Summary

For the reasons outlined below, Beyond PMSA fully supports the submission of the ACNC in the addition of 2 objects to section 15-5(1) of the Act such that there will be 5 objects of the ACNC, being:

- (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;
- (c) To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector;
- (d) To promote the effective use of resources of not-for-profit entities; and
- (e) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.

Due to the genesis of our organisation, the members of Beyond PMSA are keen to enhance the accountability of not-for-profit entities to donors, stakeholders, customers and the public in general.

In addition to our full support of the ACNC submission, we wish to make comment on the following issues:

1. Communication constraints on Commission investigations;
2. Self-reporting and continuous self-improvement;
3. Increased accountability and transparency of charities by ensuring public has access to relevant information on the ACNC Register;
4. Duty to manage conflicts of interest under Governance Standard Number 4; and
5. Obligating charities who wish to obtain tax benefits and hold Deductible Gift Recipient status, to comply with modern governance standards.

Why are we making this submission?

Beyond PMSA believes that the ACNC is an important element in the regulatory landscape for Australian Charities and Not-for-profits, and the ACNC is relied on by Australian taxpayers and stakeholders in these entities to have sufficient regulatory power to investigate and act in situations where serious concerns have been raised. In effect, the ACNC should have the same role for charities and not-for-profit organisations that ASIC has for companies along with the same powers to enforce the legislative provisions.

The charitable sector has grown considerably in recent years and the need for legislation and regulatory powers to catch up to that growth has now become evident.

In relation to entities constituted by Letters Patent, the ACNC is the only regulatory body which has a publicly searchable website from which information can be obtained about the entity and its branches or trading names, together with a register of its Responsible Persons. Therefore, the ACNC's role has further significance in these circumstances, albeit that its own powers are curbed to some extent as detailed in its own submission.

Whilst acknowledging the strong desire on behalf of Australian charities and not-for-profits to have a slim lined regulatory and reporting framework, in our view not all regulators are created equal, and many do not have sufficient investigative powers, nor a mandate to provide publicly available information to the stakeholders of these entities and the Australian taxpaying public. Transparency plays a significant role in enforcing both moral and legislative standards and as such should be promoted as a core power of the ACNC.

Accordingly, we fully support the submission of the Australian Charities and Not-for-profits Commission to this legislative review.

1. Communication restraints on Commission investigations

Beyond PMSA has had the advantage of reading the Submission of the Australian Charities and Not-for-profits Commission Advisory Board's of 29 January 2018.

Beyond PMSA fully supports the Advisory Board's submission in relation to the issue of communication restraints on ACNC Investigations. While the ACNC is unable to confirm that an investigation is ongoing, comment on the matters under investigation, or disclose reports once a charities registration has been revoked, there is no transparency to the stakeholders or the Australian public. Further, there is no ability for the charitable and not-for-profit sector to learn from real cases and outcomes.

We fully support the submission that the secrecy provisions be reviewed and amended as appropriate to enhance public trust and confidence in the sector.

Beyond PMSA has had the advantage of reading the Submission of the Australian Charities and Not-for-profits Commission.

Beyond PMSA fully supports the ACNC submission in relation to the issue of communication restraints on ACNC investigations. We endorse the proposal 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, including confirming when an investigation has commenced, disclosing action that the ACNC has or is proposing to take in relation to a charity or responsible person.

In our view the ACNC should be able to disclose a regulatory outcome.

2. Self-reporting and continuous self-improvement

Beyond PMSA has had the advantage of reading the submission of the Australian Charities and Not-for-profits Commission Advisory Boards of 29 January 2018.

Beyond PMSA fully supports the Advisory Board's submission in relation to the issue of self-reporting of breaches of the Act, and the fact that such self-reporting acts as a disincentive to continuous improvement at the organisational level.

We strongly recommend that the Act empowers the ACNC to prosecute and seek remedy for breaches of the Act in similar ways the Corporations Act.

3. Increase the accountability and transparency of charities by ensuring the public has access to relevant information on the ACNC register

Beyond PMSA has had the advantage of reading the submission by the Australian Charities and Not-for-profits Commission and endorses the view that the objects of the ACNC Act should include:

“to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public”

Further we lend our support to the submission that ACNC officers are authorised to disclose protected ACNC information for the purposes of making a public comment or publishing information about the Commissioner's regulatory activities when it is in the public interest to do so. We absolutely agree that the current restrictions on protected ACNC information impair the Commissioner's ability to operate as an effective regulator.

Beyond PMSA supports the submission that protected ACNC information which should be disclosed includes confirming that an investigation has been commenced, disclosing action that the ACNC has taken or is proposing to take in relation to a regulated charity or a responsible person and disclosing a regulatory outcome.

We support this submission due to the fact that the current secrecy restrictions on protected ACNC information can result in further harm to donors, beneficiaries and stakeholders, and as such is in direct contrast to the first objective of the ACNC legislation, which is to *“maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector”*.

As stated at paragraph 6.11 of the ACNC submission:

“Currently, the secrecy provisions impose significant constraints on the ACNC's ability to inform the public about the use of these approaches in particular cases. The absence of any comment from the ACNC in cases that are the subject of media interest may lead the public to conclude that the ACNC is not taking the action that would be expected of an effective charity regulator. This, in turn, may have an adverse effect on public trust and confidence that the sector is effectively regulated.”

We support recommendation 21 that the ACNC participates in a wider conversation about the reporting requirements for charities, in particular whether registered charities should continue to have the option of providing special purpose financial statements.

Beyond PMSA strongly believes that all large charities should produce general purpose financial reports, given their significant stakeholder group and the benefits that they receive through taxation concessions.

Further, we fully support recommendation 24 that auditors auditing charitable entities should have a duty to report reasonable grounds of suspicion that a significant contravention of the ACNC Act has occurred or is likely to occur and it cannot be adequately dealt with by commenting in the auditors' report. Further this duty should mirror requirements in the Corporations Act 2001 (Cth) such that the auditor also has the requirement to identify attempts to unduly influence, coerce, manipulate or mislead someone in the conduct of an audit including an attempt to interfere with the proper conduct of an audit.

Beyond PMSA supports recommendation 28 such that all charitable entities, regardless of whether they submit special purpose or general purpose financial reports, should adopt the requirement to report on related party disclosures as outlined in Accounting Standard AASB 124.

Due to the reliance by large members of the public and stakeholders on annual financial reports, Beyond PMSA supports recommendation 34 to extend the administrative penalty regime to annual financial reports.

Beyond PMSA has had the advantage of reviewing the submission by Independent Schools Queensland. In this submission they state:

“ISQ would request that independent schools be exempt from any annual reporting to the ACNC, as reporting of the same or similar information is already reported under the requirements of other Commonwealth government authorities. ISQ would also request that there be a permanent exemption on financial reporting to the ACNC, with the ACNC recognising in perpetuity, the reports given to the Department of Education (Cth) as satisfying the ACNC reporting”.

Whilst we acknowledge that there is a lot of information which is required to be submitted to the Commonwealth government authorities, only a limited amount of financial information per school is published on the My School website, and hence only a selection of this financial information is available to stakeholders in these schools.

Financial information about a particular non-government school is important to that school's stakeholders and, by extension, the Australian public. Firstly, most parents are expected to pay enrolment fees over and above tuition fees, many years in advance of the actual start date of that student's schooling. Further, some parents are enrolling their children for a considerable period of time, mostly 6-13 years. Given the substantial nature of the enrolment fees and the length of period of time of commitment, we submit that a prospective customer/parent wants to determine whether the educational institution has the financial

capacity to be in existence at the completion of their child's schooling. Without even the most basic of financial information at a school level, this analysis cannot be done.

The latest financial information per school on the My School website is for the financial year 2015 (1 January 2015 to 31 December 2015). We understand from the Australian Curriculum, Assessment and Reporting Authority (ACARA) that the earliest that the financial data for financial year ended 31 December 2016 will be published is 7 March 2018.

If an equivalent Annual Information Statement was required to be published on the ACNC website, it would have been required by 30 June 2017.

Further, the financial information on the My School website only includes selective financial information (recurrent income and capital expenditure). It does not reflect operating expenditure nor does it reflect net operating profit or margin, an important indicator of future viability of a school.

We also refer to the "2017 (2016 Data) Financial Questionnaire for Non-Government Schools Instructions" (https://ssphelp.education.gov.au/sites/ssphelp/files/files/2017_2016_data_fq_instructions.pdf)

It is stated that the information in the Financial Questionnaire must be drawn from the school entity's audited financial statements. And that if the entity operates multiple schools, a reconciliation must be prepared and lodged which balances the schools' financial information with the entity's audited financial statements when completing the Financial Questionnaire. Note further on page 4 that it is stated:

"The information is collected:

- ***To be drawn upon **selectively** to create the My School finance report for your school;***

Importantly, the publicly available information, because is it drawn selectively, does not have the required level of detail to ensure that a stakeholder can assess even the most basic of questions about the school's future viability.

Further, at page 11 of the "2017 (2016 Data) Financial Questionnaire for Non-Government Schools Instructions", it states that when there are transfers of funds between Systems and their schools:

"Under the methodology, there are specific forms of system transactions that are out-of-scope and excluded for My School reporting but need to be reported in the FQ. These transactions are to be reported by the system in the system FQ return and not allocated to individual schools."

Hence there may be significant variations between the information available via My School, and the Financial Questionnaire, which itself is reconciled back to the audited financial accounts.

We submit that in the absence of this financial data being reportable to the ACNC via the Annual Information Statement, there is no reliable timely financial data available on non-government schools for their stakeholders to obtain. We therefore submit that the financial data on My School is no substitute and is inadequate for stakeholder needs.

It should also be noted that substantial government funding, both commonwealth and state, is provided to the education sector with little or no transparency in whether this funding is used for its rightful purpose.

We submit that without this information being reported and published by the ACNC, there is no transparency and no public trust and confidence in this section of the not-for-profit sector. We therefore do not support the submission by Independent Schools Queensland in relation to this issue.

4. Duty to manage conflicts of interest

Beyond PMSA has had the advantage of reviewing the submission by ACNC and endorses the view that the ACNC Regulation is amended to ensure that not only are conflicts of interests of Responsible Persons appropriately disclosed, but also that such conflicts of interests are appropriately managed as per recommendation number 38.

5. Obligating charities who wish to obtain tax benefits and hold Deductible Gift Recipient status, to comply with modern governance standards

In Beyond PMSA's particular circumstances, the core issue that led to the formation of the organisation was the lack of transparency and accountability of the PMSA. Furthermore, the complicating factor is that the PMSA was formed under an archaic Letters Patent that ultimately precludes the requirement to comply with modern governance standards, and nor does it require the organisation to have any real form of transparency or accountability.

Beyond PMSA respects the rights of organisation who were formed, and continue to operate, under Letters of Patent.

However, Beyond PMSA supports changes to legislation that withdraws all tax benefit or concessions to charities that do not comply with the applicable Associations Incorporation Acts (for example, Queensland 1981, New South Wales 2009 as amended), which is in effect the modern governance tool that compels organisations to meet their governance requirements.

Governments at all levels provide considerable tax advantages to charities in the form of:

- Commonwealth
 - Income tax exemptions
 - Franking credit refunds
 - GST concessions
 - FBT rebates \ exemptions
 - Deductible Gift Recipient Status

- State
 - Stamp Duty
 - Land Tax
 - Payroll tax
- Local
 - Rates concessions

Further, modern governance expectations require a clear separation of the owners, or in the case of charities, the stakeholders, and the directors or board members who govern such organisations. Without clear separation, there can be no accountability.

For example, this separation is impossible to achieve in an organisation constituted by Letters Patent. It can also be difficult to achieve in the situation of companies limited by guarantee where, by reason of the drafting of the constitution, the only members of the organisation are the directors.

The Beyond PMSA members believe that to require such stakeholder representation as a pre-condition to Deductible Gift Recipient status or ACNC registration would enhance internal accountability and scrutiny of charitable organisations, reducing reliance on regulatory agency scrutiny and intervention which can be expensive, and necessarily limited and delayed.

Beyond PMSA also advocates that to obtain any tax benefits or concessions, that the charity must also elect to comply with the Privacy Act 1988 if it is not already obligated to do so.

Beyond PMSA believes that in return for receiving the above tax benefits, charities must be held to account for their governance, and requiring compliance with the applicable Associations Incorporation Acts and the Privacy Act 1988 are the appropriate ways to achieve this.

Beyond PMSA is grateful for the opportunity to present this submission on behalf of our members, and we welcome the opportunity to be further involved in this process.

Yours sincerely



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