



Law Council  
OF AUSTRALIA

*Legal Practice Section*

**13 August 2019**

Hon Dr Gary Johns  
Commissioner  
Australian Charities and Not-for-profits Commission  
GPO Box 5108  
MELBOURNE VIC 3001

By email: [research@acnc.gov.au](mailto:research@acnc.gov.au)

Dear Commissioner

**Public Consultation: Additional Insight into the Charity Sector**

Thank you for the opportunity to contribute a response to the Australian Charities and Not-for-Profits Commission (**ACNC**) consultation paper, 'Public Consultation – Additional Insight into the Charity Sector' (**Consultation Paper**).

As you will be aware, the Law Council exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law. The Not-for-Profit Legal Practice and Charities Group is part of the Law Council's Legal Practice Section and provides a network for lawyers interested in the law affecting not-for-profit organisations and charities. The Not-for-Profit Legal Practice and Charities Group has assisted in the development of this response.

*Background to the Consultation paper*

The Consultation Paper seeks views to inform an ACNC proposal to include in the annual Australian Charities Report information on how charities are progressing against four benchmarks listed in Object 1(b) of the Australian Charities and Not-for-Profits Commission Act 2012 (ACNC Act). These benchmarks are 'robust', 'vibrant', 'independent', and 'innovative'.

The Consultation Paper follows a literature review produced by Tulipwood Economics at the request of the ACNC and an earlier consultation process associated with that literature review.

*The Objects of the ACNC Act*

The objects of the ACNC Act are set out in s 15-5 of that Act. They are:

- 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 Law Council notes that, as objects of the ACNC Act, these objects are properly understood as informing the interpretation of the ACNC Act itself. They are not properly understood as informing the regulatory practice of the ACNC or the powers of the ACNC Commissioner, except in an indirect way. The proposal to gather and publish information on how charities are progressing against the benchmarks of 'robust', 'vibrant', 'independent' and 'innovative' is not required or even mandated by Object 1(b) of the ACNC Act. Indeed, applying ordinary principles of statutory interpretation to the ACNC Act, it would be surprising, to put it mildly, if the ACNC Act contained such a legislative requirement or mandate in the absence of explicit statutory wording to that effect.

A further point to note about Object 1(b) of the ACNC Act is that the meaning of the words in that provision of the Act is to be determined applying ordinary principles of statutory interpretation. Thus, the words take their ordinary meaning, understood in context and informed by legislative purpose. The ACNC proposal assumes that the words 'robust', 'vibrant', 'independent', and 'innovative' can be given meaning informed by economic analysis, and then deployed as benchmarks on that basis. Again, this proposal is neither required nor mandated by the statutory text and indeed seems at odds with the meaning of that statutory text when interpreted according to orthodox legal methods.

In sum, the Law Council submits that the proposal to gather and publish information on how charities are progressing against the benchmarks of 'robust', 'vibrant', 'independent' and 'innovative' has no explicit statutory footing and is in key respects at odds with the ACNC Act when properly interpreted.

#### *Economic Analysis and the Benchmarks*

The literature review produced by Tulipwood Economics, which informs the ACNC proposal, focuses primarily on literature in the academic discipline of economics. The ACNC proposal itself entails applying economic methods to ascertaining the content of the four benchmarks, 'robust', 'vibrant', 'independent' and 'innovative'. This exclusive focus on economic analysis and methods is unjustified. Literature has been generated in numerous academic disciplines, for example philosophy and sociology, that illuminates the question of the value and effectiveness of the charity sector.

Moreover, a number of public policy initiatives are on foot around the world adopting these multiple disciplinary perspectives in seeking to measure and assess the charity sector in different ways. A number of these initiatives are referred to in the response of the Queensland Law Society to the Consultation Paper, which the Law Council has seen and benefited from reading.

The Law Council submits that, if the ACNC proposal to track charity progress against the benchmarks of 'robust', 'vibrant', 'independent' and 'innovative' is to proceed (and we think it should not proceed), then those benchmarks should be informed by the full range of relevant academic and policy work and not only by work done by economists. In the absence of some compelling argument, there is simply no reason to prefer economics over other disciplines and perspectives.

#### *Contact*

The Law Council is grateful for the opportunity to provide this input in relation to the Consultation Paper. If you require further clarification, please contact in the first instance

Ms Jennifer Batrouney QC, Chair of the Law Council's Not-for-Profit Legal Practice and Charities Group at [Jennifer\\_Batrouney@vicbar.com.au](mailto:Jennifer_Batrouney@vicbar.com.au) or on (03) 9225 8528.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smithers', with a long horizontal stroke extending to the right.

**Jonathan Smithers**  
**CHIEF EXECUTIVE OFFICER**