



Submission to:

**The Australian Securities and Investment
Commission (ASIC)**

Whistleblower protections and the charities sector

September 2019

Introduction

This brief submission outlines key issues in relation to the ASIC consultation on whistleblower protections and the requirements to be imposed on charities across Australia.

CCA does not believe it is appropriate for charities to be required to have a whistleblower policy in place.

CCA has consulted with members (see listing in Attachment A) in framing this submission, however, it is important to note that this submission does not override the policy positions outlined in any individual submissions from CCA members.

CCA has long been a supporter of the need for an independent regulator of charities in Australia rather than relying on the Australian Taxation Office and other regulators, like ASIC, to regulate the charities sector. CCA has advocated for the establishment and retention of the Australian Charities and Not-for-profit Commission (ACNC) as a way of delivering increased transparency, accountability, and sustainability for the Australian charities and not-for-profit sector.

The content of this submission includes: a brief background to CCA; an overview of the current context for the NFP sector; an outline of four key issues in relation to whistleblowing and charities; and a conclusion.

It should be noted that CCA provided a submission to The Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors* in 2017.

CCA welcomes this opportunity to provide input into this ASIC consultation.

The Community Council for Australia

The Community Council for Australia (CCA) is an independent non-political member-based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks to change the way governments, communities and not-for-profits relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of NFPs in Australia. This includes:

- promoting the values of the sector and the need for reform,
- influencing and shaping relevant policy agendas,
- improving the way people invest in the sector,
- measuring and reporting success in a way that clearly articulates value,
- building collaboration and sector efficiency,
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures,
- providing a catalyst and mechanism for the sector to work in partnership with government, business and the broader Australian community to achieve positive change.

Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

Background context: the not-for-profit sector

The NFP sector encompasses over 600,000 organisations - from large to very small - and employs well over 1.3 million staff (around 10% of all employees in Australia) and involve over 3 million volunteers. Australia's 56,000 charities collectively turn over more than \$143 billion each year and hold over \$275 billion in assets. In the last decade, sector growth has continued at more than 7% a year, a figure that is higher than any other industry group.

These facts tell only a small part of the story. The real value of the NFP sector is often in the unmeasured contribution to Australian quality of life. NFPs are at the heart of our communities; building connection, nurturing spiritual and cultural expression, and enhancing the productivity of all Australians. Collectively, they make us a more resilient society.

The importance of the NFP sector is now being internationally recognised with many governments putting in place measures to increase NFP investment and productivity. Smaller government and bigger community is a common theme, driven in part by savings, but also by a commitment to greater civic engagement, social entrepreneurship and productivity within the NFP sector.

For many decades there was no consistent regulation of charities in Australia other than the one-off requirement for those seeking any form of taxation concession to register with the Australian Taxation Office. For many, the process of working with the Australian Taxation Office to gain charitable status was a negative experience. Once registered, most charities never had any further contact with any regulator. ASIC played a limited role in overseeing some aspects of public companies limited by guarantee, a structure adopted by some charities.

The establishment of the Australian Charities and Not-for-profit Commission (ACNC) is the first time the NFP sector has had an independent regulator dedicated to providing a one-stop-shop approach to charity regulation and enhancing their capacity. The ACNC has already proved to be a positive step towards red tape reductions, increased transparency, and enhancing trust in the community. The national charities register has also provided invaluable information to millions of Australians.

It is important to note the ACNC was set up in consultation with the charities sector and sought to support the sector as well as regulate the sector (see this explanation of Object 2 in the ACNC Act <https://probonoaustralia.com.au/news/2019/02/second-object-acnc-act-mea>).

When there were proposals to disband the ACNC, many charities expressed significant concern. Surveys conducted between 2012 and 2015 by Pro Bono Australia consistently identified over 75% of charities supported the establishment and maintenance of the ACNC.

The recent history of the NFP sector is framed by growth and reform, but new issues and challenges are emerging. The level of volunteering and individual philanthropic giving as a percentage of income has still not recovered to the highs of 2009. The revenue available to governments to support the work of charities is effectively falling in real terms against a backdrop of increasing demands and higher community expectations. Competition for fundraising and services income has also increased.

The level of uncertainty across the charities sector is having a negative impact on medium and longer term strategic-planning, and reducing investment in organisational capacity. This translates into diminished capacity and limited expenditure on the organisational activities that increase the quality and responsiveness of services provided to communities.

Given the charities sector now has a dedicated charities regulator, it is important that multiple regulators do not further impose unnecessary regulatory imposts on the charities sector.

Key issues on the performance of the ACNC

1. Whistleblowers need to be protected

There are few, if any, charity and not-for-profit organisations that do not support the importance of ensuring whistleblowers are encouraged to come forward and identify unacceptable or inappropriate practices within their organisations.

The charities sector has a good track record in supporting transparency and accountability. The primary commodity traded by charities is trust. It is for this reason that the charities sector strongly supported and endorsed the establishment of the Australian Charities and Not-for-profit Commission (ACNC). Charities recognise that ridding the sector of bad practices strengthens the sector.

CCA and its members are committed to the goal of providing appropriate protections to whistleblowers raising concerns in relation to unacceptable or inappropriate practices within charities.

2. Existing whistleblower practice in charities

CCA acknowledges that charities are not perfect and that the widespread support for the principle of protecting whistleblowers does not mean best practice whistleblower protections are in place in every charity. At the same time, there is limited, if any, evidence that current whistleblower practices in the charities sector are inadequate.

The nature of protections currently provided to whistleblowers in the charities sector varies from well-developed codes of conduct (an example of this might be the Australian Council for International Development Code of Conduct) to almost no documented protections at all.

Many charities operate within areas such as education or health where the application of broader whistleblower protection obligations is integral to employment practices.

There is some information suggesting that whistleblowers are already the primary source of complaints to the ACNC about the actions of charities in Australia, although it can be difficult to accurately assess complaint and investigation practices given current secrecy provisions applied to the ACNC.

For any charity staff member, associate or member of the public, the ACNC makes it very clear that complaints about the actions of any charity can be lodged anonymously. As stated on the ACNC website: *There is no specific protection for whistleblowers under the ACNC Act. However, if you wish to raise a concern, you are entitled to do this anonymously or using a pseudonym, where reasonable.*

The ACNC has developed a comprehensive fact sheet for charities on whistleblower protections: <https://www.acnc.gov.au/tools/factsheets/whistleblower-protections>

There are several other very good guides to whistleblowing prepared specifically for charities, particularly since the new whistleblower laws came into force. There are also some excellent guides around complaint handling and many charities, including smaller charities, are aware of the need to implement good practice in this area.

In general, most larger charities will have some form of whistleblower policy as part of their overall governance documentation, and most smaller charities will not have documented protections. This is not surprising given almost 50% of charities employ no paid staff and rely extensively on volunteers.

3. Scaling the response – including all charities is inappropriate

One of the major concerns for charities is the appropriate scaling of requirements, not only in relation to whistleblower protections, but also in relation to other areas of reporting and accountability.

Charities with annual revenue over \$10 million make up less than 5% of all charities. Approximately 80% of all staff employed in charities are employed by the top 5% of charities. The majority of these employees are in areas where there are employee whistleblower protections; universities, schools and hospitals (see: https://www.csi.edu.au/media/Australian_Charity_Report_2015_Web_ND8DU2P.pdf)

While most of us are aware of the outstanding work of many big-name charities, it is important to remember that these larger national charities are the exception. Even with these larger charities, it is often volunteers that oversee governance as well as contributing directly to the work of the organisation.

The vast majority of charities are very small organisations with limited capacity for regulatory compliance across multiple regulators. Very small organisations that may not have staff or may only employ a handful of casual staff, should not have to fulfill unrealistic regulatory and administrative requirements.

CCA strongly believe any proposal to implement new whistleblower protection requirements across the whole NFP sector needs to allow for appropriate scale and size to be taken into account when setting obligations. All charities should not have the same obligations in relation to whistleblower protections.

4. The role of regulators – charities report to the ACNC

The charities sector strongly supports the role of the ACNC.

The data provided by the ACNC to date suggests that many with concerns about inappropriate practices in Australian charities are prepared to use the ACNC to raise their concerns.

Over 1800 complaints were made about charities in 2017/18. This indicates people are aware of the role of the ACNC and prepared to use it to raise their concerns.

There is considerable work to be done around how information about these complaints and their investigation by the ACNC is reported publicly. There is a need for the ACNC to be better able to report on its investigations to ensure people feel their complaints have been acted upon. This is part of ensuring the ACNC contributes to enhancing public trust and confidence in charities.

There is no suggestion that the identity of complainants to the ACNC need to be identified. The ACNC will maintain a confidential avenue for any whistleblower to raise concerns about any charity.

The ACNC is:

- becoming better known as the regulator of charities,
- reporting a consequent rise in the number of complaints about charities,
- continuing the commitment to protecting the identity of complainants and provide an accessible complaints process,
- providing charities and others with fact sheets and other information about best practice whistleblower protections.

It seems inappropriate to add another regulator to the already crowded field of authorities imposing administration and compliance costs on charities.

Conclusion

CCA believes it is important to support and protect whistleblowers across the charities sector.

There is no evidence that a lack of formal whistleblower protections is a significant issue within charities.

There is absolutely no grounds to include all charities in whistleblower protection obligations, especially given that the vast majority of charities employ less than 5 staff.

There may be some grounds for including the very small minority of very large charities with a turnover above \$10 million (less than 5% of all charities), but even within this group, most already have to comply with a significant number of regulators and oversights of their operations including policies relating to complaints and whistleblower protections.

The charities sector has embraced the ACNC as their regulator, providing the highest level of voluntary compliance in provision of information to the regulator anywhere in the world. The ACNC are providing good oversight of governance and other issues. Creating new obligations beyond those already imposed by the ACNC would be a retrograde step.

Finally, the charities sector faces many imposts from Federal regulators and departments, State and Territory regulators and departments, local government, and a range of other regulators as well as the ACNC.

For a sector characterised by very small organisations largely dependent on voluntary Boards and limited staffing, it is clearly regulatory over-reach to insist on the development of whistleblower protection provisions for all charities.

Current Membership – Community Council for Australia *Attachment A*

Access Australia's National Infertility Network

Adult Learning Australia

Alcohol, Tobacco and Other Drugs Association ACT

Arab Council Australia

Australian Community Support Organisation (ACSO)

Australian Conservation Foundation

Australian Council for International Development, Marc Purcell, CEO (CCA Board Director)

Australian Major Performing Arts Group, Bethwyn Serow, Executive Director (CCA Board Director)

Australian Scholarships Foundation

Australian Women Donors Network

Carers Australia

Centre for Social Impact

Church Communities Australia

Churches of Christ Vic and Tas

Community Based Support (Tas)

Community Broadcasting Association of Australia

Community Colleges Australia

Connecting Up

Diabetes NSW & ACT

Ethical Jobs

Everyman

Foresters Community Finance

Foundation for Alcohol Research and Education

Foundation for Young Australians

Fragile X Association of Australia

Fundraising Institute Australia

Good Samaritan Foundation

Good2Give

Hammondcare

Healthy Options Australia, Jody Wright, CEO (CCA Board Director)

Hillsong Church, George Aghajanian, CEO (CCA Board Director)

Housing First

Justice Connect

Life Without Barriers, Claire Robbs, CEO (CCA Board Director)

Lock the Gate

Mater Foundation, Nigel Harris, CEO (CCA Board Director)

Menslink

Mission Australia

Missions Interlink

Musica Viva Australia

Non Profit Alliance

Our Community

OzHarvest

Painaustralia

Palliative Care Australia

Philanthropy Australia

Pro Bono Australia

Queensland Water & Land Carers

Ronald McDonald House Charities

RSPCA Australia

SANE

SARRAH

Save the Children, Paul Ronalds, CEO (CCA Board Director)

Settlement Services International

Smith Family, Lisa O'Brien, CEO (CCA Board Director)

Social Ventures Australia

St John Ambulance

Starlight Foundation, Louise Baxter, CEO (CCA Board Director)

Ted Noffs Foundation

Touched by Olivia

Uniting Church in Australia, Synod of Victoria and Tasmania

Variety Australia

Volunteering Australia

Wesley Mission, Keith Garner, CEO (CCA Board Director)

World Wildlife Fund