



# Report on Regulation and the Contemporary Not-for-profit

Based on the Proceedings of a Summit held at  
The University of Western Australia on 26 November 2018

Not-for-profits UWA Research Group



Charity Law Association of  
Australia and New Zealand



THE UNIVERSITY OF  
**WESTERN  
AUSTRALIA**



UWA  
Public Policy  
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## Foreword

Examining not-for-profit (NFP) regulation is timely with the 2018 *Strengthening for Purpose Report of the Australian Charities and Not-for-profits Commission Act (ACNC Act) Review*, the passage of electoral funding laws, the recent appointment of a new ACNC Commissioner with a greater focus on market accountability and significant NFP-impacting policy developments such as the implementation of the National Disability Insurance Scheme (NDIS). Longer term and more global themes are also pertinent, such as the role of NFPs in our democracy, the extent to which regulation should move beyond charities to the broader NFP sector and the role and regulation of NFPs in international relations and cross border service delivery.

To investigate these themes, the NFPs University of Western Australia (UWA) Research Group presented a summit in November 2018, bringing together key stakeholders from academia, regulators and the NFP sector. At this event, the inaugural Charity Law Association of Australia and New Zealand annual keynote lecture was delivered by UWA Chancellor, Hon Robert French AC.

In this report, we have endeavored to synthesise and analyse participants' discussions and presentations at the summit. It is hoped that this report can contribute to ongoing policy debates on NFP regulatory reform and the key steps that might be taken to achieve policy consensus and implementation.

## Acknowledgements

We sincerely thank all participants and presenters for their insights. Thanks are also due to the Charity Law Association of Australia and New Zealand for supporting the summit and commissioning this report, as well as to the UWA Public Policy Institute and the Faculty of Arts, Business Law and Education at UWA for their support.

*Ian Murray, David Gilchrist, Fiona McGaughey, Kylie Hansen, Ava Hill-De Monchaux.*

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## About NFPs UWA Research Group

The [NFPs UWA Research Group](#) (NFPs UWA) was formed in 2017 by scholars with a deep interest in the NFP sector. With the objective of fostering interdisciplinary research, collaboration and engagement, NFPs UWA itself reflects the diversity and significance of the NFP sector. As such, the research group is interested in issues ranging from the nature and function of the sector, to the performance, governance, reporting and regulation of NFPs.

We are also cognisant of the increasingly blurred boundaries between NFPs and the public and commercial sectors. Our key strengths lie in the broad spectrum of sector experience and research inquiry of our members. The three founding members are also editors of the [Third Sector Review Journal](#).

## Contents

Foreword.....	2
Suggested Citation .....	2
About NFPs UWA Research Group .....	3
Executive Summary .....	4
1. ‘Regulation of the Not-for-profit Sector’: The inaugural CLAANZ annual lecture by the Hon Robert French AC .....	7
2. The <i>ACNC Act</i> Review and what it means for NFPs .....	9
3. How can we advance the regulatory reform agenda arising from the ACNC Act review? .....	16
4. Advocacy and philanthropy .....	20
5. Charity accountability .....	23
6. Conclusions and Recommendations .....	26
<b>Reform priorities</b> .....	26
<b>Future summit topics</b> .....	28
<b>How can academia support the NFP sector?</b> .....	28
Annexure of Summit Presenters .....	30



## Executive Summary

Examining NFP regulation is timely with the 2018 *Strengthening for Purpose Report* of the ACNC Act Review, the passage of electoral funding laws, the recent appointment of a new ACNC Commissioner with a greater focus on market accountability and significant developments such as the NDIS. To investigate these themes, the NFPs UWA Research Group presented a summit in late November 2018, involving a range of presentations and workshops from academics, regulators and sector representatives. These included the inaugural Charity Law Association of Australia and New Zealand keynote lecture delivered by the Hon Robert French AC.

Delegates comprised a strong Western Australia contingent while around 20 per cent of delegates came from interstate or represented national organisations. A focus on issues of practical importance to the sector was ensured as almost 30 per cent of delegates represented NFPs (peak bodies, social services charities, medical research, environmental organisations and philanthropic foundations),<sup>1</sup> with another quarter comprising legal and accounting advisers and over 10 per cent from regulators or other government bodies. Academic research was not neglected, as around 30 per cent of delegates were university academics and research students.

This report synthesises and analyses presentations and discussions from the Summit. It is hoped that it can contribute to ongoing policy debates on NFP regulatory reform and the key steps that might be taken to achieve policy consensus and implementation.

### **Part One: Keynote address ‘Regulation of the Not-for-profit Sector’ by the Hon Robert French AC.**

The Hon Robert French AC set the scene citing a number of parallels between regulation of the charity sector and regulation of the financial services sector, an area extensively analysed by the Financial Services Royal Commission. For a regulatory regime to have democratic legitimacy and public confidence, it must have clear purposes and those purposes must be consistent with broadly accepted community values. This can be challenging given the diversity of the sector and with a potential expansion of this diversity if the ACNC regulatory regime is extended to non-charity NFPs as recommended in the *Strengthening for Purpose Report*. However, greater diversity which brings greater resources might counterintuitively lead to a lighter touch regulatory regime and a regulator better able to encourage compliance with the regulatory purposes. Challenges in defining the nature of ‘not-for-profit’ were also identified, with Hon Robert French AC commenting that relying on case law to flesh out the meaning of ‘not-for-profit’ as recommended by the *Strengthening for Purpose Report*, might not be the best approach when cases are mere accidents of history, rather than reflecting a strategic process.<sup>2</sup>

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<sup>1</sup> Excluding academic staff and students.

<sup>2</sup> The Hon Robert French’s full lecture can be obtained from the NFPs UWA webpage ([www.research.uwa.edu.au/not-for-profits-uwa](http://www.research.uwa.edu.au/not-for-profits-uwa)).

### **Parts Two and Three: Panel session and related workshop on the ACNC Act Review and what it means for NFPs.**

This session brought together regulators, sector representatives and academics to reflect on what the *ACNC Act* Review will mean, practically, for NFP organisations. In setting the scene, it was noted that the review was mandated in the *ACNC Act* because the *ACNC Act* was perceived by some as controversial due to its potential impact on freedom of expression, as well as freedom of religion and of association. Further, the ACNC, as an administrator, is in an unusual position as the *ACNC Act* Review is a legislative review with most recommendations requiring Parliamentary action. Some delegates expressed concern that the extensive recommendations in the *Strengthening for Purpose Report* may have detracted from a general sector attitude of ‘it ain’t broke, don’t fix it’ and a corresponding loss of focus on the real priorities such as achieving a single national regulatory scheme.

### **Part Four: Panel on advocacy and philanthropy.**

This session focussed on the dual role for the NFP sector – service delivery and advocacy, and the ways in which managing this dual role presents challenges. The cumulative effect of the plurality of recent developments – ACNC Legislation Review 2018, the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), ‘gagging’ through government funding clauses, restrictions on charitable status, ‘whistleblower’ elements and the funding landscape – has the potential to over-regulate the NFP sector’s important advocacy work. While philanthropists may play an important advocacy role themselves, they can also play a critical role in providing opportunities for NFPs to reduce reliance on government funding, potentially enhancing advocacy. This discussion included a comparative perspective from the NGO sector in India and reflections on the specific challenges for charities working on environmental issues.

### **Part Five: Panel on charity accountability.**

Advisers and academics asked just what ‘charity accountability’ entails. They considered the definition of accountability; what it means for charities to be independent; and why it is important for the sector to be accountable and independent. This informs answers to questions such as: ‘What should government regulation of charities look like?’ and ‘How much government control of charities via funding agreements should we tolerate?’. If charity independence is valuable, it might also suggest that we should be wary of charity accountability, even though there seems to be a *prima facie* case for charity accountability because of the public support they receive. In exploring these questions, panellists commented on the level of regulation for different types and sizes of NFPs and challenged assumptions that a lack of profit motive for NFPs makes them less efficient than for-profits, thus requiring further monitoring. They also lamented the lack of commonly accepted financial benchmarks; reflected on the concepts of transparency versus accountability and considered the impact of all of these issues on the NFP workforce, as one of the largest workforces across Australia.

## **Part Six: Conclusions and recommendations.**

The Summit provided space for participants to identify the regulatory reforms that they felt would have the largest positive impact, alongside practical steps to achieve those reforms.

The overriding concern for participants, and a common theme throughout the Summit, was for the reduction of unnecessary regulatory obligations imposed upon the NFP sector. Participants identified that this *ACNC Act* object had not been appropriately resourced and that this needed to occur to effect change in this area.

The second major proposal from participants was to fully resource and support the ACNC to implement its object of supporting a robust, vibrant, independent and innovative Australian NFP sector.

Third, some participants also suggested that the implementation of a single national scheme for charity and NFP regulation would support both these priorities. The concept of a charity one-stop-shop, as envisaged in the original national discourse relating to the establishment of a national regulator and the establishment of the ACNC itself, has been one of the most significant steps towards this goal. However, real achievement toward this end has been lacking.

Participants also considered future summit topics and engaged with questions about how academia can support NFPs. In addition to strengthening and building on what is already being done, participants suggested that more opportunities for networking and engagement across sectors were required, with NFPs and charities having the opportunity to generate research questions in partnership with academics.

## 1. ‘Regulation of the Not-for-profit Sector’: The inaugural CLAANZ annual lecture by the Hon Robert French AC

The inaugural CLAANZ annual lecture was delivered by the Hon Robert French AC.

The Hon Robert French’s full lecture can be obtained from the NFPs UWA webpage at [www.research.uwa.edu.au/not-for-profits-uwa#past-events](http://www.research.uwa.edu.au/not-for-profits-uwa#past-events). However, several key points are examined here. In particular, we focus on the parallels drawn by French between regulation of the charity sector and regulation of the financial services sector, an area that has seen extensive analysis under the Financial Services Royal Commission led by Commissioner Kenneth Hayne AC QC.



First, for a regulatory regime, and consistent with the rule of law, to have democratic legitimacy, to engender compliance, to create public confidence, to be applied reasonably, predictably and consistently and to not cause excessive transaction costs, it must have clear purposes and those purposes must be consistent with broadly accepted community values. French referred to Hayne’s Interim Report as emphasising the

need for both clarity of underlying purpose and clarity in framing the legislation giving effect to those underlying purposes, so as not to obscure the purposes. That is, care must be taken that the complexity of the law does not cause regulators to start asking ‘can I do this?’, rather than ‘should I do this?’, which better reflects internalisation of the underlying purposes.

To this end, French identified the volume and complexity of legislation, as well as the extent of overlap between Commonwealth and State legislation. These are clearly issues for charity law.<sup>3</sup> In addition, although French did not directly discuss the point, the three *ACNC Act* purposes are not all clear. ‘Maintain[ing], protect[ing] and enhanc[ing] public trust and confidence in the Australian not-for-profit sector’ and ‘promot[ing] the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector’ pose some challenges, but the real uncertainty arises in the second object: ‘support[ing] and sustain[ing] a robust, vibrant, independent and innovative Australian not-for-profit sector’.<sup>4</sup> Indeed, the ACNC is currently commissioning research to try and determine the meaning of this object.<sup>5</sup>

<sup>3</sup> See, eg, Ian Murray, ‘Regulating Charity in a Federated State: The Australian Perspective’ (2018) 9(4) *Nonprofit Policy Forum* (forthcoming).

<sup>4</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(1).

<sup>5</sup> Tulipwood Economics, ‘Measures in Support of the Not-for-profit Sector: Indicators of Object 1(b) ACNC Act’ (Final Report, 6 December 2018).

Second, if the ACNC regulatory regime is extended beyond charities to at least some non-charity not-for-profits as recommended in the *Strengthening for Purpose Report*, that will materially increase the diversity of regulated entities, making the ACNC's task more challenging by materially expanding the ACNC's 'field of action'. French also noted the potential for greater diversity to result in more pressure to reduce the extent to which regulation impinges upon the efficiency or effectiveness of NFPs and to lead to greater resourcing for the ACNC. In effect, greater diversity might counterintuitively lead to a lighter touch regulatory regime and a regulator that is better placed to encourage compliance with the regulatory purposes.

The centrality and challenges in defining the nature of 'not-for-profit' was also identified. Indeed, French commented that relying on case law to flesh out the meaning of 'not-for-profit' as recommended by the *Strengthening for Purpose Report*, might not be the best approach when cases can be mere accidents of history, rather than reflecting a strategic process to developing meaning. However, given the large pool of NFPs, we wonder whether it might be possible that a test-case funding approach might generate a more strategic method of arriving at a definition, a point to which this report returns in Part 2.

Third, while public advocacy by regulated charities may be controversial, so too may public advocacy by regulators. For example, while advocacy that encourages regulated entities to comply with the law may be uncontentious, advocacy on matters of policy, such as for an expanded regulatory remit or broader powers has the potential to lead to regulatory creep and to perceptions of politicisation of the regulator. This may raise questions about whether a regulator has applied their resources in an effective and efficient manner in accordance with their administrative responsibilities.

The ACNC entered this territory in its submissions to the *ACNC Act Review* when it requested the enlargement of its objects to include 'promot[ing] the effective use of the resources of not-for-profit entities' and 'enhanc[ing] the accountability of not-for-profit entities to donors, beneficiaries and the public'. As discussed in Part 2 of this report, this lens also raises questions about the extent to which we might legitimately expect the ACNC to set and prosecute a coordination and harmonisation agenda in respect of not-for-profit regulation across Commonwealth and state/territory levels.

## 2. The ACNC Act Review and what it means for NFPs

Kylie Hansen chaired a diverse panel providing comment and reflections on the *Strengthening for Purpose Report*,<sup>6</sup> the result of the ACNC Act Review process. The panel comprised a member of the review panel (Dr Matthew Turnour), a representative of the regulator (Mr Murray Baird, ACNC Assistant Commissioner), a sector representative (Ms Louise Giolitto, WACOSS CEO) and academics (Dr Ian Murray, UWA Law School and Professor David Gilchrist, UWA Business School).

In setting the scene, Turnour noted that the review was mandated in the ACNC Act. While the ACNC Act did not specify why, Turnour said that he recalled that it was because the ACNC Act was perceived by some as controversial due to its potential impact on freedom of expression, as well as freedom of religion and of association. Baird also identified that the ACNC, as administrator of the ACNC Act, is in an interesting position in that the ACNC Act Review is a legislative review with the vast majority of the recommendations requiring Parliamentary action.



However, the ACNC does have power to implement three of the recommendations:

- Recommendation 3, to prioritise education and research functions, including by way of behavioural economics insights.
- Recommendation 14, that registered entities be required to disclose related party transactions, which can be implemented by amending the questions in the Annual Information Statement.
- Recommendation 21, that the ACNC's regulatory approach to high-risk (money laundering and terrorism) registered entities be further developed in partnership with other agencies such as the Australian Transaction Reports and Analysis Centre and the Australian Criminal Intelligence Commission.

The central *Strengthening for Purpose Report* recommendations were examined. These, along with differing perspectives on those points made by panellists and other participants, are synthesised below under the headings of the relevant recommendation(s) but in the order the issues were raised rather than in recommendation order. Where appropriate, we have added editorial comments.

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<sup>6</sup> Available at: <https://treasury.gov.au/publication/p2018-t318031>.

- (a) **Recommendation 1: that the ACNC objects not be changed** (for example, not adding the ACNC's proposed two additional objects relating to effective use of resources and enhanced accountability to donors and others).

While panellists considered that the ACNC's objects could be improved in certain respects, the general view was that the *Strengthening for Purpose Report* recommendation should be supported to ensure stability for the NFP sector.

However, Giolitto noted that the late inclusion of the ACNC's second and third objects in the *ACNC Act* has meant that the ACNC was only directly resourced to carry out its first public trust and confidence object. She suggested that, as the majority of charities are accountable and comply with the law (certainly when compared to financial services entities as demonstrated by the Financial Services Royal Commission), the ACNC should direct greater resources and focus to its second (sustaining a robust, vibrant, independent and innovative NFP sector) and third (red tape reduction) objects. Some participants however pointed to sector-specific risks such as abuse of vulnerable people, citing, for example, the recent Australian Council for International Development report into sexual misconduct by humanitarian workers.

Nevertheless, there was general agreement that more focus ought to be paid to the second and third objects, with pathways to focusing on these objects including:

- A self-review by the ACNC of how it has delivered on its three objects.
- For the second object, having the ACNC report annually on the impacts and outcomes achieved by charities.
- For the third object, focussing on government contracting conditions rather than providing further information to donors (given the relatively high proportion of government funding as opposed to grants from private donors).
- As a link between the second and third objects, the ACNC should seek to achieve aligned impact and outcomes reporting across government agencies. As noted by Gilchrist, identifying impacts and outcomes so as to capture what matters most will be critical.

- (b) **Recommendations 19 and 20: relating to advocacy**; *i.e. resourcing the ACNC to enforce and develop the existing law around disqualifying purposes and enabling test case funding in public interest matters.*

The advocacy recommendations were generally well received, although Giolitto emphasised the sector's perspective that NFP advocacy was coming under greater scrutiny, and in some cases, attack from the federal government. Baird noted the ACNC's position that it is not anti-advocacy and simply administers the law which permits advocacy, subject to advocacy not amounting to a disqualifying purpose (e.g. where it reflects a purpose of promoting or opposing a political party or candidate).

**(c) Recommendation 28: that a single national scheme be developed for the regulation of charities and NFPs, involving:<sup>7</sup>**

- a. *the states and the Commonwealth shifting (through referral of powers, or harmonised administration) most registration and reporting responsibilities to the ACNC;*
- b. *the states referring powers to the Commonwealth to enable ACNC enforcement of duties and protection of charity assets, but potentially with continued state/territory enforcement and with some state ability to set divergent governance duties, to be enhanced by a presumption of compliance with the ACNC governance standards arising from the application of state duties.*

Panellists generally thought that shifting registration and reporting responsibilities to the ACNC was uncontroversial, given it brings marked administrative and compliance efficiencies, along with the potential for a better information base. However, a national approach to the enforcement of duties and protection of charity assets was perceived to be more problematic as it has the potential to impinge to a greater extent on state sovereignty and on approaches tailored to local circumstances.

These sentiments reflect the North American academic discourse, which suggests that charity regulation ought to remain fragmented between different levels of government and different agencies within a federation, but that there is room for harmonisation of definitional aspects for the purposes of registration, centralisation of information gathering and reporting, and greater coordination in governance enforcement.<sup>8</sup>



From the perspective of supporting a fragmented, federalist, approach to regulation, it may therefore be best if the ACNC does not always act as the key enforcer of governance duties and protector of charity assets even if that involves higher administration and compliance costs and so is less efficient. As such, some caution should be exercised about the *Strengthening for Purpose Report* referral of powers recommendation, as well as its recommendation to give the ACNC an explicit function of ‘enforc[ing] the law of

<sup>7</sup> P. McClure et al, ‘Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018’ (Report and Recommendations, 2018) 111-114.

<sup>8</sup> See, through a regulatory theory lens, L Mayer, ‘Fragmented Oversight of Nonprofits in the United States: Does it Work – Can it Work?’ (2016) *Chicago-Kent Law Review* 937, 944-5. See also, L Mayer and B Wilson, ‘Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis’ (2010) *Chicago-Kent Law Review* 479; M Fremont-Smith, ‘The Future of State Charities Regulation’ (Columbia Law School Charities Regulation and Oversight Project Policy Conference on the Future of State Charities Regulation, 2013); M Owens, ‘Challenged Regulators’ in M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: The Inside Story* (Routledge, 2017) 81; E Boris and C Lott ‘Reflections on Challenged Regulators’ in M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: The Inside Story* (Routledge, 2017) 97.

charities’.<sup>9</sup> The report acknowledges that governance duties ought to be able to vary to some extent between jurisdictions and charity types and that the details of a national scheme are still to be worked out, so that if such caution is exercised, it remains possible to adopt a fragmented enforcement approach consistent with the recommendation.

This discussion highlights the inherent weakness of the *ACNC Act* Review in focussing on federal regulation and the work still to be done in implementing a national scheme. It is thus critical to have a body that can undertake a coordination and agenda setting administrative function.<sup>10</sup> Following the disbanding of the Office of the Not-for-profit Sector within the Commonwealth government in 2013 and of the Council of Australian Governments NFP Reform Working Group, the ACNC has partially filled this role. However, it is difficult for a federal regulator to speak too broadly on matters of policy, especially where they involve the states and territories and where they move beyond simple matters of regulatory duplication. Nor is the ACNC directly funded for this role.

**(d) Recommendation 24: that registration with the ACNC be extended to income tax exempt and donation concession non-charity NFPs with annual revenue of more than \$5 million. The change was estimated to affect only 580 entities.**

Several panellists identified the extension to non-charity NFPs as a major risk, ‘a clear way to stuff things up’, unless done well and done cautiously. The size and diversity of the NFP sector also poses conceptual challenges to determining what entities are included, a concern assuaged to a degree by the *Strengthening for Purpose Report’s* focus on relatively well defined categories of entities that are income tax exempt or have associated donation concessions. Even so, registration based primarily on NFP status is likely to strain the bounds of what it means to be ‘not-for-profit’ to a greater degree than charity registration. That is because the need for a charitable purpose and the public benefit test for charities provide additional ways to restrict the provision of private benefits, with the NFP requirement then largely focussed, for charities, on the distribution of profits to members.<sup>11</sup>

There is, though, no Australian legislative definition of ‘not-for-profit’ and, as noted by French (see Part 1), any definition poses serious difficulties.<sup>12</sup> The *Strengthening for Purpose Report* suggested that the common law would continue to suffice, provided the ACNC has sufficient test case funding to clarify areas of uncertainty. Yet, as noted above, there is likely to be greater pressure on the common law definition where the key question is NFP status, as opposed to the broader suite of tests applicable to charity status. This means that there may be a much greater need for clarity than envisaged by the report. Further, even if it is possible

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<sup>9</sup> McClure et al, ‘Strengthening for Purpose’, above n 7, 33, 37, 111-14.

<sup>10</sup> Cf Productivity Commission (Cth), ‘Contribution of the Not-for-profit Sector’ (Research Report, 2010) 369, 378.

<sup>11</sup> Cf J Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013).

<sup>12</sup> Consultation on a statutory definition at the same time as consultation on charities legislation in 2003 identified several key challenges around NFPs operating in groups and of a self-help nature: Exposure Draft Charities Bill 2003 (Cth).

to adopt a strategic approach to test case funding (see Part 1), it is questionable whether courts are well placed to answer questions of uncertainty arising from policy decisions such as whether trading cooperatives or financial mutuals ought to be included within the ACNC regulatory regime.

One approach the ACNC might take is to focus on the for-purpose aspects of NFPs, analogously to the need for charities to have charitable purposes that are for the public benefit. For example, the Productivity Commission has defined NFPs as ‘organisations established for a community purpose, whether altruistic or mutual in nature’.<sup>13</sup> This might alleviate some of the pressure on the NFP test, which could potentially remain focussed on structure and operation,<sup>14</sup> but be twinned with an additional requirement for the NFP to have a community purpose. Virtually all Deductible Gift Recipient and income tax exempt entity categories are currently defined explicitly, or implicitly, by reference to a purpose and so it would not be difficult to include those purposes as acceptable types of community purposes. This approach also highlights the outcomes and impacts NFPs are intended to achieve, rather than what they should not do.

Panellists also identified resourcing implications for the ACNC and the need to be conscious of the timing of extension given the current proposals to transfer non-government deductible gift recipients to the ACNC, although as noted by French in his speech, an increased pool of regulated entities should strengthen the ACNC’s case for receiving greater resources.

**(e) Recommendation 17: that the ACNC have discretion to publicly disclose information about its regulatory activities, including investigations when it is necessary to protect public trust and confidence.**

The *ACNC Act* imposes a secrecy regime that reflects that applying to tax administrators. This means, for example, that the ACNC cannot generally publish reasons for its enforcement decisions and cannot confirm whether it is even conducting an investigation.

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<sup>13</sup> Productivity Commission (Cth), ‘Contribution of the Not-for-profit Sector’ (Research Report, 2010) 3-8.

<sup>14</sup> See, eg, L Salamon and H Anheier, ‘Toward a Common Definition in L Salamon and H Anheier (eds), *Defining the Nonprofit Sector: A Cross-National Analysis* (Manchester University Press, 1997) 29, 31-4.

There is clearly a need for a balance here between the public benefits arising from disclosure and the harms disclosure might cause.<sup>15</sup> Benefits might include increased legitimacy for the regulator as it is perceived to be acting promptly to address charity breaches and greater consumer protection for donors. The publishing of reasons might also build greater legitimacy for the ACNC by demonstrating and instilling compliance with public law requirements of administrative action, as well as serving an educational role for registered entities. Furthermore, we note that obliging the ACNC to provide reasons (at least to affected entities and responsible persons) about a disclosure decision, might itself encourage a proper exercise of discretion by ACNC officers.<sup>16</sup>



Potential harms could include a reduction in charities' willingness to provide detailed information to the ACNC or a lack of procedural fairness for the charity under investigation. The regulator's legitimacy could also be diminished if the regulator is perceived to use investigation as a tool to silence charities. The recommendation's requirement for disclosure to be necessary to protect public trust and confidence and the additional *Strengthening for Purpose Report* proposal that the ACNC consider the potential prejudice to a registered entity provides some protection against these harms. Nonetheless, panellists still expressed some concerns about the manner in which the ACNC might exercise its powers – suggesting that any amendments will need to emphasise the importance of weighing benefits against harms.

**(f) Recommendation 5: that the ACNC's powers to replace a responsible person be removed.**

There was a divergence of views on this recommendation, with some supporting it on the basis that the power extends beyond that typically held by other Australian federal regulators. Baird offered a more nuanced perspective that noted the constraints of the power itself. The power being to 'suspend' or 'remove',<sup>17</sup> not 'replace' responsible persons. Baird noted the separate considerations for suspension or removal of responsible entities and appointment of acting responsible entities. He noted the application of these provisions being limited to federally regulated entities and the likely exemption for basic religious charities. He referred to the existence of similar powers held by the Charity Commission of England and Wales<sup>18</sup> and similar powers for some state and territory regulators.<sup>19</sup> He thus suggested that the

<sup>15</sup> See also McClure et al, 'Strengthening for Purpose', above n 7, 71-7.

<sup>16</sup> Cf Philip Pettit, 'Institutional Design and Rational Choice' in R E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1998) 54, 83-4.

<sup>17</sup> *ACNC Act 2012* (Cth) div 100.

<sup>18</sup> *Charities Act 2011* (UK) c 25 ss 76, 79.

<sup>19</sup> Cf *Associations Act* (NT) s78(1)(e); *Associations Incorporation Act 2009* (NSW) s55.

context of charity regulation may require a different approach to powers given to regulators of other activities and also pointed to the extensive procedural safeguards for suspension and removal powers contained in the *ACNC Act*. In addition, if further safeguards are required, there is the potential to add a requirement for court approval to justify and protect the use of such a power, also reflected in such powers for a further range of Australian state and territory charity regulators.<sup>20</sup>

**(g) Recommendation 15: for disclosure by large registered entities of remuneration paid to responsible persons and senior executives.**

Panellists and participants were broadly supportive of the recommendation, with Gilchrist noting that disclosure is consistent with the general requirements of Australian and international accounting standards. To the extent that charities are concerned that remuneration league tables or other interpretations of remuneration data will misrepresent a charity's circumstances, this should not preclude disclosure, but should rather bolster a broader approach to building financial literacy within the Australian community.

Following the panel discussion, some attendees expressed concern that the extensive number of recommendations in the *Strengthening for Purpose Report* may have detracted from a general sector attitude of 'it ain't broke, don't fix it' and a corresponding loss of focus on the real priorities such as achieving a single national regulatory scheme. Accordingly, the next part considers the priority issues for summit participants.



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<sup>20</sup> Cf *Associations Incorporation Reform Act 2012* (Vic) s116, 119(8); *Associations Incorporation Act 2015* (WA) ss110(2), 114(2). The relevant attorney-general could also typically apply to the court for such orders under trustee legislation or in the court's inherent jurisdiction.

### 3. How can we advance the regulatory reform agenda arising from the ACNC Act review?

Ian Murray chaired this workshop that focussed on regulatory reform proposals arising from or inspired by the *ACNC Act* review. The workshop involved all conference delegates identifying the regulatory reforms that they would most like to see achieved, alongside practical steps to achieve those reforms.

The most commonly raised reform proposals from the workshop, and practical steps along a pathway to achieving the reform, are discussed below. The reform proposals are listed according to their popularity among summit participants – most popular to least popular. Under each proposal, we have synthesised the discussion on practical steps along a pathway to achieving the reform.

#### **Reform proposals:**

##### **(a) Fully resource/support the ACNC to implement its object of promoting the reduction of unnecessary regulatory obligations on the Australian NFP sector.**

This reform proposal was significantly more popular than others. Approximately 50 per cent of participants indicated that this was their priority proposal.<sup>21</sup>

#### *Reform pathway ideas:*

- Obtain greater resources for the ACNC by way of an advocacy strategy that comes from the sector. After all, this object was added to the legislation late in the piece and with no directly linked funding for the ACNC.
- This approach needs to include the development of a communications strategy.
- Greater adoption of the charity passport<sup>22</sup> by government agencies may also support this reform.
- A question was raised as to whether the ACNC is the right place for a red tape reduction agenda setting role, given that it is an administrator at the federal level, whereas much of the regulatory duplication is due to Commonwealth/state and territory overlap. Steps here may include:
  - The ACNC could provide access to experts and identify areas for potential red tape reduction – a more apolitical role.
  - This priority may be driven through targeted advocacy by peak bodies and beneficiaries, with the ACNC supporting, rather than driving.
  - In order to drive the political process, the COAG NFP Working Group could be revived, or the Office for the Not-for-profit Sector could be re-established within the Department of Prime Minister and Cabinet (DPMC).

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<sup>21</sup> Voting estimates do not total 100 per cent as not all participants voted.

<sup>22</sup> ACNC, 'Charity Passport', <https://www.acnc.gov.au/about/red-tape-reduction/charity-passport>.

**(b) Fully resource/support the ACNC to implement its object of supporting a strong, independent and vibrant Australian NFP sector.**

Approximately 20 per cent of participants indicated that this was their priority proposal, however, in voting for their priority proposal, many participants stated that they considered this as part of Proposal 1, reducing unnecessary regulatory obligations.

*Reform pathway ideas:*

- Obtain greater resources for ACNC by way of an advocacy strategy and communications strategy that comes from the sector.
- In addition to resourcing, a key difficulty for the ACNC in implementing this object is a lack of agreed meaning for the terminology used in the object and a lack of awareness of the existence or need for baseline data. The November 2018 report *Measures in support of the not-for-profit sector: Indicators of Object 1(b) ACNC Act* reflects a good start in trying to define the terminology. However, the ACNC should work closely with peak bodies, which have been undertaking this capacity-building and support work for their members for some time.
- The ACNC may produce an annual report based on measures (yet to be agreed upon) with respect to this object.
- It is important for trust and confidence in the sector and for sustaining the sector that positive stories make their way through to regular media recognition, balancing the more negative stories that often gain traction.



**(c) Implement a single national scheme for charity regulation (noting that this is also a key element of reducing unnecessary regulatory obligations, as described above).**

Approximately 12% of participants indicated that this was their priority proposal, however, in voting for their priority proposal, many participants stated that they considered this as part of Proposal 1, reducing unnecessary regulatory obligations.

*Reform pathway ideas:*

- It is worth noting and acknowledging that this is a political process.
- It can, however, be achieved while maintaining federalism. For example, the Internal Revenue Service scandal in the United States has led to greater reliance on state Attorneys-General.<sup>23</sup>
- The NFP sector should come together to push for key steps in a staged process.
- This priority also needs to be adequately resourced.

<sup>23</sup> See, eg, Fremont-Smith, 'State Charities Regulation', above n 8; Owens, 'Challenged Regulators', above n 8; Boris and Lott 'Reflections on Challenged Regulators', above n 8.

**(d) Expand the ACNC regulatory regime beyond charities to non-charity NFPs.**

This and subsequent proposals received 3 per cent or less support of participants.

*Reform pathway ideas:*

- This process should be approached cautiously and the Review Panel recommendation of expanding to income tax exempt/donation concession NFPs with revenues of \$5 million or more is a sensible start.

**(e) Regulation of fundraising should be reformed.**

In voting for their priority proposal, most participants grouped this into Proposal 1, reducing unnecessary regulatory obligations.

*Reform pathway ideas:*

- The *Strengthening for Purpose Report* outlined a sensible start for fundraising regulatory reform, by way of primary reliance on the ACCC implementing the Australian Consumer Law.
- Greater adoption of the charity passport by government agencies may support this reform.

**(f) Related party transactions should be disclosed as proposed in the *Strengthening for Purpose Report*.**

*Reform pathway ideas:*

- The ACNC could mandate that the Annual Information Statement request the disclosure of related party transactions, with AASB124 Related Party Disclosures being applied to appropriate registered entities (such as medium and large registered entities).<sup>24</sup>

**(g) The ACNC secrecy provisions should be relaxed as proposed in the *Strengthening for Purpose Report***

*Reform pathway ideas:*

- Registration and compliance decisions should be generally be published by the ACNC. For instance, New Zealand's publication of Charity Registration Board decisions is one model.<sup>25</sup> The Australian Taxation Office (ATO) publication of

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<sup>24</sup> As suggested in McClure et al, 'Strengthening for Purpose', above n 7, 60-1.

<sup>25</sup> See, eg, Andrew Phillips, 'How the Charities Registration Board Makes Decisions' (Charities Services, December 2016) <<https://www.charities.govt.nz/news-and-events/blog/how-the-charities-registration-board-makes-decisions/>>.

private binding rulings provides another example.<sup>26</sup>

**(h) Best practice in reporting achievement against mission.**

*Reform pathway ideas:*

- There is a need to develop/adopt a common classification system.
- A baseline must also be measured. Reporting and compliance requirements that are not focussed on outcomes/achievement of mission should be reduced.

**Additional recommendations:** participants recommended mechanisms that would support reform across the board, and across all the identified reform priorities. These included:

- Implementation of Recommendation 8 in the Report, which identified that the Advisory Board should provide advice/feedback to the Commissioner through its own initiative, and not solely when the Commissioner asks for advice.
- Greater adoption of the charity passport by government agencies, which would necessarily involve bringing the relevant parties together to agree on a common information system.
- Provision of, or access to, funding for test cases.

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<sup>26</sup> Australian Taxation Office, 'Publishing of private rulings', [https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-\(rulings\)/Private-rulings/Publishing-of-private-rulings/](https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Private-rulings/Publishing-of-private-rulings/).

#### 4. Advocacy and philanthropy

Chair and facilitator: Dr Fiona McGaughey (UWA Law School)

Speakers: Dr Alka Sabharwal (UWA Social Sciences), Chris Evans (Walk Free Foundation);

Declan Doherty (Environmental Defender's Office); Chris Twomey (WACOSS)

Fiona McGaughey introduced the panellists and provided some opening reflections on advocacy and philanthropy. She argued that much of the work of the NFP sector consists of the delivery of services but that another essential role is that of advocacy. In some ways, this is a more critical role for the sector because, whereas Governments or private sector can - or could - deliver services, they are not as well placed to undertake advocacy. Furthermore, those dealing with people and issues on the ground have an important insight into ways in which services, regulation, policies, laws and funding can be improved.

McGaughey went on to outline the increasing focus on philanthropy in Australia with significant foundations such as the Paul Ramsey Foundation and Minderoo Foundation making important contributions. Nonetheless, the funding from philanthropy contributes only 8.3 per cent of income to Australian charities.<sup>27</sup>

With respect to regulation of the sector, McGaughey outlined the number of current and potential constraints on advocacy for Australian NFPs. Although there is an implied freedom of political communication within the Australian constitution, Australia remains the only Western democracy without a constitutional or statutory bill of rights.<sup>28</sup> As such, protections for the freedom of speech necessary for advocacy work



remain somewhat limited – a factor to consider within a regulatory pluralism framework. Other former, current and potential limitations to NFP advocacy mentioned by McGaughey included advocacy related recommendations in the ACNC Legislation Review 2018, the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), ‘gagging’ through government funding clauses, restrictions on charitable status, ‘whistleblower’ elements in laws, and the funding landscape. McGaughey argued that the cumulative effect of the plurality of recent developments could over-regulate the NFP sector’s important advocacy work.

<sup>27</sup> Australian Charities and Not-for-Profits Commission (ACNC), ‘Australian Charities Report 2015’.

<sup>28</sup> Fiona McGaughey, ‘Advancing, retreating or stepping on each other’s toes? The Role of Non-Governmental Organisations in United Nations Human Rights Treaty Body Reporting and the Universal Periodic Review’ (2017) 35 *Australian Yearbook of International Law* 187.

Alka Sabharwal's extensive work, policy and academic experience in the Non-Government Organisation (NGO) sector across India and South Asia places her in a unique position to compare the advocacy role of NGOs across jurisdictions. Sabharwal outlined the colonial experience of Asian countries, particularly India, and the reach of state control into the private and NGO sectors. NGOs developed in India, as they often do, in response to market failures.

Sabharwal noted that NGOs and grass roots organisations in India often define themselves as organisations trying to mobilise people on various issues, and this activism was seen to be peacefully co-existing alongside 'the promotion of constructive work'. Further, though NGO capacity for engagement in electoral politics is limited by their legal status as charitable entities, their support of causes in national and state politics is well known in India.

India's NGOs have, however, been facing a crisis beyond issues of technical competence or efficiency of delivery. Sabharwal details how the registrations of NGOs have been cancelled by the Indian Government over the last ten years for violating laws. The Government's concerns, however, are that NGOs are using foreign funding to criticise Indian government policies. Sabharwal argued that the crackdown on NGOs is a direct consequence of the state expanding its reach. The issues relating to the accountability of NGOs, and to whom (i.e. government, civil society, beneficiaries, other stakeholders) are not dissimilar to questions of accountability here in Australia.

In India, NGOs failed to come up with a widely accepted accountability framework. The sector demanded a form of self-regulation, but was unable to put forward a coherent framework. The great hope in the country's NGOs as a force for the reinvigoration of democracy is being questioned.

Chris Twomey discussed two themes. First, sector perceptions that the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) and *Foreign Influence Transparency Scheme Act 2018* (Cth) were partly intended to stop charities from discussing issues on the election agenda. Twomey noted that the manner of implementation of the legislation will be critical, with the need for clarity on matters such as the treatment of expenditure on comparison scorecards for political party policies. It is thus pertinent that the Australian Electoral Commission has now released factsheets and the Explanatory Memorandum also contains numerous examples that go some way to identifying when such material might amount to electoral matter and the types of related expenditure that might be electoral expenditure.<sup>29</sup>

Second, Twomey identified the importance of a level playing field. In particular, the need for the same rules about advocacy for NFPs and For-profit (commercial) organisations, especially when many for-profits receive government support through tax concessions and other measures, even if they do not receive direct government grants.

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<sup>29</sup> Revised Explanatory Memorandum to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) 15-28.

Chris Evans reflected on philanthropist Andrew Forrest and his family representing a US trend of wealthy individuals becoming more actively involved in philanthropy. The Minderoo Foundation (and the Foundations it incorporates, such as the Walk Free Foundation) is a very hands-on foundation. Evans described the ways in which advocacy in the case of these foundations can be simpler and easier than organisations in receipt of government funding. Evans further reflected on the tension between government constraints on NFP advocacy (as manifested in gag clauses in government funding contracts) and the genuine public policy interest in ensuring that NFPs act for the public good, and generate public good.

Declan Doherty spoke about the work of the Environmental Defenders Offices (EDOs) around Australia, which perform a blend of education, advocacy and law reform. EDOs have been increasingly involved in environmental litigation as a subset of public interest litigation. Doherty further reflected on the ways in which environmental laws provide another layer of regulation (in addition to the ACNC) for environmentally-focused charities. Advocacy for the environment is critical; however, recent government action poses threats to the right to protest and advocate. These include specific requirements for environmental organisations to report on the different categories of their expenditure, including a separate line item for campaigning/advocacy to the Department of the Environment and Energy on their statistical return forms.<sup>30</sup>

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<sup>30</sup> Department of the Environment and Energy (Cth), *Register of Environmental Organisations 2018 Statistical Return Form* (2018).

## 5. Charity accountability

David Gilchrist chaired this panel, asking professional advisers of the NFP sector (Bob Campbell, accounting, and Penny Knight, management consulting) and academics (Ramon Wenzel, business and Matthew Harding, law) just what charity accountability entails.

Matthew Harding reflected on the statutory objects of the ACNC – ensuring trust and confidence in the charity sector and supporting its independence. He noted that notions of accountability and independence are integral to our notions of NFPs and charities, but their interrelationship is complex, and it is difficult to talk about one without examining the other. Harding initially addressed the definition of charity accountability, and posed the question: accountability to whom – funders, members, beneficiaries, or the public in general? The latter is of most interest for present purposes. He also considered what it means for charities to be independent, focussing on independence from government. This means that charities are not formed by government (noting that sometimes they are), that decisions about how charities are operated are made to some degree free of government interference or control, and perhaps that charities do not participate in the political processes that surround government, although this can be controversial.



Harding then asked whether the charity sector should be accountable; and he used the family unit as a comparative example. Should the family be accountable, in the sense of giving an account of itself according to evaluative standards established by others for that purpose? In a liberal state this seems odd. The charity sector, however, receives support in ways that the family does not, and this support carries with it an expectation of accountability.

Whilst this might distinguish the charity sector from the family, it does not render the charity sector a unique regulatory object. The business sector also receives public support in various forms, and is therefore accountable to governmental regulation. Harding suggested that the difference (if it exists) is of degree, not kind. The charity sector is subject to more governmental regulation than the business sector because private models of accountability are less available (for example, the beneficiaries of a private trust hold the trustee accountable; a charitable trust has no beneficiaries).

Harding also asked whether the charity sector should be independent and if so, why? This question informs answers to quite specific questions of relevance to charity accountability. For example, what should governmental regulation of charities look like? Harding's working

view is that we should value charity independence. Drawing on John Stuart Mill, we should see charities as a site for free expression of the independent self and for the cultivation and realisation of pluralism in matters of value and in modes of being in the world; and so an independent charity sector plays an important role in the constitution of a liberal society. Harding's reflections then come full circle - if charity independence is so valuable, then we should be cautious about charity accountability. In asking whether there is a way to realise charity accountability without compromising independence Harding suggested:

- First, we could try to balance accountability and independence across the full range of charitable endeavour. The difficulty here is that any balancing exercise invites disagreement and indeterminacy; the balance is a matter on which reasonable minds might disagree.
- Second, we could rethink what we expect charities to do. Charities could potentially withdraw from pursuits that make them accountable in ways that seem to interfere intolerably with their independence. One example of this is the government's expectation that the charity sector will deliver a range of social welfare programmes pursuant to funding agreements under which government sets priorities and controls the operations of charities to a high degree. Perhaps it would be better for the state to take back the delivery of these programs.

Penny Knight continued Harding's exploration into the need for accountability of NFPs, questioning whether all NFPs should be regulated. For example, do local tennis clubs and small NFPs (that are far closer to the family sphere identified by Harding) require the level of scrutiny that currently exists? There was also discussion of the expanding role of the for-profit sector in service provision. Knight also expanded on Harding's reflections with respect to NFP and for-profit sector service provision, suggesting that NFPs are 'overly accountable' for what they do in comparison to other businesses and for-profit providers. Further, Knight questioned and challenged the efficiency assumptions which exist by critics of the sector, that because there is no profit motive, NFPs are less efficient than for-profits and therefore need to be monitored further.

Bob Campbell identified a fiduciary dimension to charity accountability - that charities serve vital community functions and that people who control charities are community agents and therefore ought to be accountable. However, charity controllers are humans and so make human errors. It is the auditor's role to detect such human errors and, therefore, auditors need to be sceptical to perform their function properly. Campbell noted that a difficulty for auditors was the absence of benchmarks of accountability. He referred to the US Charity Navigator as potentially providing an approach, with 'accountability' defined as an obligation or willingness to explain charity actions to stakeholders, and the related concept of 'transparency' defined as an obligation or willingness by a charity to publish and make available critical data about the organisation.<sup>31</sup> While Charity Navigator has adopted a range of benchmarks under these definitions, Campbell considered that Australian NFP financial statements are not transparent and cannot be easily compared. Much work needs to be done to

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<sup>31</sup> See, eg, <<https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1093>>.

develop commonly accepted benchmarks and universities can play a useful role in this process. In the meantime, if an organisation wants to demonstrate good stewardship of resources, it should clearly identify the benchmarks by which it thinks it ought to be assessed and should provide information demonstrating the extent to which it meets those benchmarks.

Ramon Wenzel argued that in terms of accountability, accountability for the NFP workforce is a critical area, given the importance of people to the sector. Around 1.3 million employees and 2.9 million volunteers work via 52,817 charities for a better Australia. This NFP workforce is among the largest nationally and improving its productivity will generate more positive impact. Wenzel provided an overview of ‘Learning for Purpose’<sup>32</sup>, an applied research program that addresses capacity building and workforce development in the NFP sector. It seeks to inform practice, policy, and theory about maximising NFPs’ capability so they can better realise their mission and social change. Knight though noted the need for caution that looking after an NFP workforce (for example, through remuneration) is not perceived as a loss of focus by an NFP on its mission.

In addition to these matters, summit participants discussed the following:

- The issue of accountability to members versus other stakeholders. In particular, should ACNC governance standard 2 require registered entities to be accountable to stakeholders beyond members? Harding noted that this is one expression of the larger question of what it means to have fiduciary responsibility in a charity setting. The starting point is to ask what it means for one to have a fiduciary responsibility to a charitable purpose and there is much promise here for achieving greater clarity. Knight noted that this question helped highlight distinctions between small member-serving NFPs such as tennis clubs and other NFPs. Gilchrist commented that a link between stakeholders and purpose can be found in looking at who might be impacted by a NFP decision about its pursuit of purposes. For example, are NFPs talking about clinical risk assurance arrangements for clients rather than just financial performance?
- Whether a move to competitive tendering for funding might inhibit disclosure / accountability about what is being done poorly, what hard lessons providers have learnt, and what could be improved. This was a sentiment with which many panellists agreed.
- Whether the *Strengthening for Purpose Report* recommendation 15 about disclosure of executive remuneration might encourage further corporatisation of management practices and service delivery. Knight suggested that revealing salaries might have the opposite effect of achieving greater recognition for the NFP sector and its practices. Campbell identified that disclosure would act as a brake on high salaries and an incentive to increase salaries that are too low. Gilchrist reiterated concerns about the potential for misuse of the information and the need for greater community financial literacy.

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<sup>32</sup> See: <https://learningforpurpose.org/>

## 6. Conclusions and Recommendations

This Part summarises the key themes from the workshops and the feedback from participants throughout the Summit.

### Reform priorities

	Reform Proposal	Reform Pathway
1	<p>The overriding concern for all participants was the reduction of unnecessary regulatory obligations imposed upon the Australian NFP sector. Participants identified that this <i>ACNC Act</i> object had not been appropriately resourced or funded, and that it needed to be in order to affect change in this area.</p> <p>Participants generally acknowledged that the ACNC was not the only body that needed to be involved in this priority, given that it is an administrator at the federal level, when much of the regulatory duplication is due to Commonwealth/state and territory overlap and to policy decisions. However, participants also stated that given the ACNC is a key body, that this priority expressly falls within its objects, and that the ACNC has considerable support and respect across the sector, it is in an ideal position to play a supporting role in implementing this reform priority, alongside targeted advocacy by the sector.</p>	<p>Key suggested pathways to implement this proposal included:</p> <ul style="list-style-type: none"> <li>• The development of an advocacy strategy and a communications strategy by the NFP sector – seeking greater resourcing for the ACNC and greater inter-governmental focus on the issue.</li> <li>• Greater adoption of the charity passport concept by government agencies would support this reform priority, as would ACNC championing of aligned impact and outcomes reporting across government agencies.</li> <li>• A self-review by the ACNC of how it has delivered on its object of ‘promot[ing] the reduction of unnecessary regulatory obligations on the Australian [NFP] sector’.</li> <li>• The ACNC could provide access to experts and identify areas for potential red tape reduction.</li> <li>• In order to drive the political and policy processes, reviving the COAG NFP Working Group, or the Office for the Not-for-profit Sector within DPMC.</li> </ul>
2	<p>The second major proposal from participants was to fully resource and support the ACNC to implement its object of supporting and sustaining a robust, vibrant, independent and innovative Australian NFP sector. Participants noted that in addition to resourcing, a key difficulty for the ACNC in implementing this object is a lack of agreed meaning for the terminology used in the object and a lack of awareness of the existence or need for baseline data to then measure achievement of the object.</p>	<p>Key suggested pathways to implement this proposal included:</p> <ul style="list-style-type: none"> <li>• The development of an advocacy strategy and a communications strategy by the NFP sector as for the first priority above.</li> <li>• In defining the terminology in the object and the data required to measure achievement, the ACNC-commissioned November 2018 report <i>Measures in support of the not-for-profit sector</i>:</li> </ul>

		<p><i>Indicators of Object 1(b) ACNC Act,</i><sup>33</sup> reflects a good start. However, participants strongly suggested that the ACNC should work closely with community service peak bodies and other peak body NFPs which have been undertaking capacity-building and support work for their members for some time and which may be able to assist with a broader understanding of the terminology than some of the economic activity and funding measures considered in the ACNC’s commissioned research.</p> <ul style="list-style-type: none"> <li>• An ACNC focus on identifying and publicising good news stories of effective NFPs. Further, if the ACNC championed aligned impact and outcomes reporting across government agencies, this might not only help reduce unnecessary regulatory obligations, but might also generate data for good news stories.</li> </ul>
3	<p>Finally, participants emphasised that the implementation of a single national scheme for charity and NFP regulation would support both the above priorities. A one-stop-shop for charities/NFPs has been discussed for some time, and the ACNC itself has been one of the most significant steps towards this goal. However, real achievement toward this end has been lacking, primarily because it requires extensive state, territory and federal coordination and cooperation. Participants acknowledged that this is a political process that will require a body that can undertake a coordination and agenda-setting function, which is difficult for a regulator at only one level of government (such as the ACNC).</p>	<p>Participants indicated that reform would be assisted by:</p> <ul style="list-style-type: none"> <li>• The ACNC providing access to experts and support in relation to technical and administrative issues.</li> <li>• In order to drive the political and policy processes, reviving the COAG NFP Working Group, or the Office for the Not-for-profit Sector within DPMC.</li> </ul>

<sup>33</sup> Australian Charities and Not-for-Profits Commission (ACNC), ‘Measures in support of the not-for-profit sector: Indicators of Object 1(b) ACNC Act’ (November, 2018).

### Future summit topics

The Summit workshops provided some rich information for future summit topics, reflecting issues of current importance to participants. These included:

- Investigation into what we mean by charity accountability and how much of it we really want.
- Clarity on the meaning of ACNC Object 1b. The ACNC's report from November 2018 provides some initial reflections, but it is important that this is also informed by the sector.
- Further engagement with respect to external conduct standards, and a reportable conduct scheme.
- Exploration and explanation of accounting standards / framework changes for NFPs/charities.
- Impact measurement and reporting, in the context of accounting standards and the broader discussion about over-regulation and high administrative burdens – what is appropriate/enough?



### How can academia support the NFP sector?

Participants took the opportunity to reflect on what is currently occurring across Western Australian universities and the sector, whilst also identifying additional opportunities to work together.

### Current good practice

Participants noted a number of positive university and NFP sector partnerships and initiatives, including the following examples:

- NFPs UWA<sup>34</sup> was formed in 2017 by a group of scholars with a deep interest in the Not-for-profit sector. With the objective of fostering interdisciplinary research, collaboration and engagement NFPs UWA itself reflects the diversity and significance of the Not-for-profit sector. As such, the research group is interested in issues ranging from the nature and function of the sector, to the performance, governance, reporting and regulation of Not-for-profits.
- 100 Families<sup>35</sup> is a project that engages with families to better understand their lived experiences of hardship. 100 Families WA is a collaborative partnership made up of

<sup>34</sup> See: <http://www.research.uwa.edu.au/not-for-profits-uwa>

<sup>35</sup> See: <http://www.100familieswa.org.au/>

ten organisations. The aim is to work with families as research partners contributing powerful and compelling stories for effective change.

- Many universities undertake student placements/internships. For example, the McCusker Centre for Citizenship<sup>36</sup> at UWA collaborates with students and the broader UWA community, NFPs, government and other stakeholders to make a difference in our communities locally, nationally and globally. The Centre facilitates structured, quality internship program with not for profit, community and government organisations locally, regionally and globally. The Centre provides transformative experiences for students to understand and engage with complex social issues.
- The Centre for Social Impact (CSI)<sup>37</sup> is a collaboration of three universities: the University of New South Wales, Swinburne University of Technology and the University of Western Australia. The Centre for Social Impact has undertaken more than 30 research projects with government, business and NFP partners and provides the nation's most comprehensive postgraduate program in social impact. CSI UWA played, and continues to play, an important role in the establishment of the WA Alliance to End Homelessness.
- There were several examples of universities working with NFPs to improve service design, program design and evaluation.
- Some academics play important roles in the NFP sector, for example through Board membership.

### **Future opportunities**

- Strengthening and building on what is already being done.
- 'Operationalising' scholarship. For example, by providing students with actual case studies and real-life situations rather than fictional scenarios.
- Networking and engagement across sectors, with NFPs and charities having the opportunity to generate research questions.
- Academia in general, does not make decisions but provides objective analysis (even if it is not always what the sector wants). This objectivity and taking the long view can be critically important in the advocacy work of the sector.
- Academia provides expertise / authority / insights (licence to think).
- Academics should interact with peak bodies, as well as individual NFPs.
- Development of tools to measure social impact.
- The sector has an important role in acting as a conduit between academics and community, and ensuring important information is articulated to those to whom it will be useful.
- Partnerships to ensure the research has practical relevance – e.g. co-creation from the outset.

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<sup>36</sup> See: <https://www.mccuskercentre.uwa.edu.au/>

<sup>37</sup> See: <https://www.csi.edu.au/>

## **Annexure of Summit Presenters**

### **Dr Richard Walley**

Dr Richard Walley OAM is a Noongar man and one of Australia's leading Aboriginal performers, musicians and writers.

Richard is a working director of his family-owned business, Aboriginal Productions and Promotions, which delivers cultural awareness and learning programs and has been in operation for over 25 years. Richard is a committed leader in the promotion of Noongar culture, and has extensive experience working alongside Australian and international organisations as a cultural consultant and presenter. Richard lectures on Aboriginal culture at UWA and is a regular host and participant at significant public and cultural events in Perth and the South West.

### **Chancellor, The Hon Robert French AC**

Robert French was appointed Chief Justice of the High Court of Australia on 1 September 2008 and retired from that office on 29 January 2017. He is a graduate of the University of Western Australia in science and law. He was appointed a Judge of the Federal Court of Australia in November 1986, an office he held until his appointment as Chief Justice on 1 September 2008. From 1994 to 1998 he was the President of the National Native Title Tribunal. Following his retirement as Chief Justice, Mr French was appointed as a Non-Permanent Justice of the Hong Kong Court of Final Appeal in May 2017 and in January 2018 as an International Judge of the Singapore International Commercial Court.

He is an Adjunct Professor at the Law School at the University of Western Australia, a Distinguished Honorary Professor at the Australian National University and an Adjunct Professor at Monash University Law School. He was elected as Chancellor of the University of Western Australia in December 2017.

### **Dr Matthew Turnour**

Matthew Turnour is a Director and the Chairman of Neumann & Turnour Lawyers and heads the Corporate and Commercial Law Division of the practice. He has a long history of involvement in the not-for-profit sector as a legal practitioner, academic and volunteer. Matthew was also a member of the Panel that conducted the 2018 review of the Australian Charities and Not-for-profits Commission legislation. Third Sector Magazine named him Influencer of the Year 2018.

### **Dr Ian Murray (UWA Law)**

Ian is Deputy Head of School - Research in the Law School at the University of Western Australia where he teaches in Taxation and Not-for-profit Law, as well as researching in the areas of Resources Taxation and the intersection between Not-for-profit Law, Tax and

Corporate Governance. He has a number of years' experience as a practitioner and practical experience in the regulatory and governance issues faced by not-for-profits, having been a not-for-profit board member for over 5 years and having worked as an in-house lawyer at the University of Western Australia. Ian's current research projects relate to:

- The accumulation of assets by charities.
- Outsourcing of government functions to not-for-profits.
- Development of analytical tools to review native title asset management structures.

Ian is a co-convenor of NFPs UWA.

### **Professor David Gilchrist (UWA Business School)**

David Gilchrist is a chartered accountant and an economic historian. He holds a PhD in economic history from the University of Notre Dame Australia and is currently Professor of accounting at the University of Western Australia. David has previously held a number of senior roles in the not-for-profit, commercial and public sectors, including as the Assistant Auditor General in Western Australia; Foundation Director of the Curtin Not-for-profit Initiative; Associate Dean of the School of Business at the University of Notre Dame Australia and Visiting Professor and Research Chief Investigator at Hebei GEO University, Peoples' Republic of China.

David currently holds a number of industry roles including as chairman of Nulsen Disability Services, a director of BaxterLawley Advisory, a member of Chartered Accountants Australia and New Zealand's National Not-for-profit Advisory Committee, a member of the Australian Charities and Not-for-profits Commission Advisory Board and of the Australian Accounting Standards Board Academic Advisory Panel.

He has published widely as an academic and journalist, and is principal author of a number of key national reports including the seminal report "Australian Charities 2013" for the Commonwealth Government and the Australian National Costing and Pricing Framework (2014). David was an editor of the "The Three Sector Solution" (2016), author of "Imperial Theory: Colonial Pragmatism" for Palgrave Macmillan (2017), and co-editor of "Public Sector Accounting, Accountability and Governance: Globalising the Experiences of Australia and New Zealand" for Routledge (2018).

David is a co-convenor of NFPs UWA.

### **Louise Giolitto (WACOSS CEO)**

Louise Giolitto has been part of the Community Services Sector for over 22 years. Louise has a great deal of experience in senior management roles in small, medium and large sized organisations. Louise has lived in the Kimberley and worked in the Pilbara which has given her great insight into the needs of regional WA. Her prior positions have provided Louise with years of valuable experience within a board range of services provided by the sector. Experience includes management of homelessness programs, housing, youth services,

Aboriginal support programs, employment, education, training, mentoring, drug education, seniors and emergency relief.

Louise has a long-standing commitment to WACOSS as the Director Sector Support and Development, former Board member and social service organisational member. Working at WACOSS is a unique experience that provides individuals with the opportunity to have an understanding across a massive range of sub-sectors and work with incredible team of dedicated staff who inspire management to be the best they can.

Underlying Louise's commitment is a strong belief in the ethos and philosophy of the community-based not-for-profit organisations striving to build vibrant future for all West Australians.

### **Kylie Hansen**

Kylie Hansen has extensive management experience across the not-for-profit sector, specialising in organisational development, strategic policy and project management. Kylie works with a number of WA community service peak bodies, including the Community Legal Centres Association (WA), the Western Australian Council of Social Service (WACOSS), Linkwest and the Youth Affairs Council of WA. She is passionate about social innovation, cross-sectoral collaboration, and understanding, articulating and measuring impact. As a Founding Director at Impact Seed, Kylie is exploring how we finance social impact, and how we can leverage and combine profit and purpose in an increasingly challenging and complex funding environment. Kylie has a wide tertiary background, with degrees and postgraduate qualifications in the disciplines of business, political science, community development, project management and social impact; and has recently completed a postgraduate law degree (Juris Doctor - UWA).

### **Murray Baird (ACNC Assistant Commissioner – General Counsel)**

A member of the ACNC Executive team since the Commission's establishment, Murray Baird has dedicated his career to not-for-profit and charity law and governance. Before joining the public sector, he was a senior partner at Moores Legal, where he led the NFP team. A sought after adviser, writer and presenter on NFP legal issues, Murray has acted in several leading cases in the field of charity law, and has served on the boards of public and private companies and charities.

Murray has been Chair of Ansvar Insurance, First Samuel Limited and the National Housing Company. He has also served on boards of schools, church and community organisations. Murray was formerly a Director of the Australian Charity Law Association and Appeals Officer for the Australian Council for International Development Code of Conduct.

### **Dr Fiona McGaughey (UWA Law)**

Dr Fiona McGaughey's key research area is international human rights law. Her PhD was on the role of Non-governmental Organisations in monitoring international human rights law –

international context and Australian case study. Fiona initially worked in the private sector as a management consultant, before moving to semi-state and not-for-profit research and policy roles, which she did for over ten years in Australia and Ireland. She has predominantly worked in the areas of disability and racial equality. During this time she held a number of positions including membership of Government steering and advisory groups and voluntary Board memberships. She is currently a Board member of the Australian Council for State School Organisations and an Editor of the Third Sector Review journal.

Fiona is a co-convenor of NFPs UWA.

### **Dr Alka Sabharwal (UWA Social Sciences)**

Dr Alka Sabharwal lectures at the School of Social Sciences. Her research focuses on state, bureaucracy and environmental policymaking in India, and she has been published both in Australia and abroad. Dr Sabharwal has worked for ten years in non-governmental organisations in the Indo-Pacific region, coordinating development-policy research programs at the likes of the International Centre for Integrated Mountain Development (ICIMOD). She is also a member of the South Asian Association of Australia and has been invited to present her research around the world.

### **Chris Evans (Walk Free Foundation)**

Chief Executive Officer, Global Freedom Network. Chris Evans was formerly a Senator for Western Australia from 1993 until 2013. He was Leader of the Government in the Senate and was a Cabinet Minister in the Rudd and Gillard Governments from 2007 to 2013. Chris Evans was Minister for Immigration from 2007 to 2010 and Minister for Tertiary Education Skills Science and Research from 2010 to 2013. He served on the National Security Committee of Cabinet and Chaired the Cabinet Productivity Committee. He represented the Australian Government at International forums including the G20 Employment Ministers Meetings, the Bali Process and ASEAN plus Ministers Meetings.

### **Declan Doherty (Environmental Defender's Office WA)**

Declan commenced with the EDOWA on January 9 2017 and is one of Western Australia's most respected environmental lawyers with a distinguished record of service to community and civil society organisations. Through his professional legal experience, Declan has a detailed understanding of all aspects of environmental law, including environmental impact assessment, water management, biodiversity conservation, climate change, Aboriginal heritage, mining and land access, and human rights.

His professional work has been recognized for its community value. In 2002, he was awarded the Freehills Jerry Knowles Award for outstanding work as a junior lawyer combined with a significant contribution to the community and the law. Declan has published in legal and professional journal publications, presented at State and national conferences, and contributed lectures to the postgraduate courses in environmental law at the University of Western Australia.

### **Chris Twomey (WACOSS)**

Chris is the Leader of Policy Development and Research at the Western Australian Council of Social Service (WACOSS) and a Senior Industry Fellow with the Bankwest Curtin Economic Centre. His primary expertise is in public policy advocacy in human service development and vulnerable consumers.

Chris leads a small policy team undertaking advocacy focused on the needs of disadvantaged and vulnerable West Australians and the effectiveness of the services that support them. He represents consumer interests and vulnerable groups on a number of advisory forums, spanning issues from national energy policy, to affordable housing, to at-risk children and young people, and is the Chair of the Green Institute.

Chris has a wealth of experience in industry, government and community engagement at both State and Federal level, with previous experience as a senior policy advisor to federal parliamentarians, a communications specialist in sustainable agriculture and natural resource management, in tertiary education of Aboriginal people, and educational multi-media. He is currently undertaking a PhD with the John Curtin Institute of Public Policy looking at social investment, early intervention and child safety.

### **Professor Matthew Harding (Melbourne Law School)**

Matthew Harding is Chair of the Board of the Charity Law Association of Australia and New Zealand and a Professor of Law at the University of Melbourne. Matthew graduated from the University of Melbourne in 1998 with first class honours degrees in law and in arts. He also holds a Bachelor of Civil Law degree (with distinction) and a D.Phil from the University of Oxford. Matthew has published widely on issues in moral philosophy, fiduciary law, equitable property, land title registration, the doctrine of precedent, and the law of charity.

### **Penny Knight (Managing Director, Baxter Lawley)**

Penny is a strategist and research expert. She has 25 years' experience in collecting and analysing business intelligence, in strategic planning and change management. Her clients have included brand name corporations, national and sub-national government agencies and Not-for-profits.

After starting her career in commercial research, she spent six years in London with KPMG's strategic planning unit before moving to Hong Kong, where she worked with PwC undertaking whole of government performance improvement projects. After returning to Australia she founded an internet database business and later worked in the Strategic Policy Unit of the WA Treasury.

In addition to being Managing Director of BaxterLawley, she is a Senior Research Fellow at Curtin University where she undertakes applied research and provides policy advice and evaluations for Commonwealth and State Government agencies and Not-for-profit

organisations. She holds a BComm, MBA and is a Graduate of the AICD. Penny is also a director of Nulsen Disability Services and Juniper, WA's leading residential and aged care provider.

### **Bob Campbell (Australian Audit)**

CA, CPA, MSW, GAICD, Registered Auditor & Tax Agent

Robert is the managing director of Australian Audit – a firm of chartered accountants specialising in audit services to the SME sector based in Perth. He is qualified in audit, tax, accounting and the governance of charities. Robert began his professional career in auditing with Peat Marwick Mitchell (now KPMG) in 1971. He moved quickly into the not-for-profit sector where he had over 25 years leading social welfare and educational organisations in a variety of CEO positions. He returned to public practice in 2004 as an audit partner. He advises on charity registration and tax matters. He serves on the Boards of Hope Community Services and Alta-1 College WA. He is also a member of the professional users group at the Australian Charities and Not-For-Profits Commission.

### **Ramon Wenzel (UWA Centre for Social Impact)**

Ramon Wenzel is a Research Assistant Professor in the Business School of The University of Western Australia where he is also a member of the Centre for Social Impact. He obtained his PhD at the UWA Business School as a member of Management and Organisations group. His expertise and principal research relates to what makes professional development, work training, and education effective.

Born in Germany, Ramon completed an undergraduate degree in business communication management in Berlin, studied in Singapore, and earned a Master of Commerce from UWA. This diverse education and excellent professional opportunities in marketing, branding, and management exposed Ramon to different schools of thought and provided him with valuable analytical, communication, and managerial skills.

Ramon draws on human psychology and organisational management in an effort to understand work learning, competency development, and training effectiveness. His research informs policy and guides capacity building in the industry and the not-for-profit sector and relates to training motivation, holistic training evaluation, training transfer, and self-regulated learning at work. Ramon is skilled in psychometric instrument development, large complex online surveys, multi-level structural equation modelling, and the analysis of cross-sectional and longitudinal panel data.