



19 July 2012

The Secretary
The House of Representatives Standing Committee on Economics
Parliament House
CANBERRA ACT 2600
economics.reps@aph.gov.au

Dear Secretary,

Submission to The House of Representatives Standing Committee on Economics Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills

About Carers Australia

Carers Australia is the national peak body representing the diversity of Australians who provide unpaid care and support to family members and friends with a disability, mental illness, chronic condition or terminal illness or who are frail aged. Carers Australia's members are the eight state and territory Carers Associations.

Our Strategic Plan 2009-2012 has a vision that 'caring is accepted as a shared community responsibility' and a mission 'to lead change and action with and for carers.' Carers Australia advocates on behalf of Australia's carers to influence policies, programs and services at a national level and it does so in collaboration with the Carers Associations.

Carers Australia believes that all carers should have the same rights, choices and opportunities as other Australians. Carers should be able to enjoy optimal health, social and economic wellbeing and to participate in family, social and community life, employment and education.

Background

Carers Australia made a submission in January 2012 on the Consultation Paper and first draft of the legislation. We were particularly concerned at that time that the draft legislation did not in any way reflect the Government's purported 'light touch' approach to regulation.¹ We also had serious reservations regarding the constitutional validity of legislating on governance requirements for organisations that are not federally regulated agencies, and the apparent disregard of important administrative law concepts such as procedural fairness.

Some of these matters have been resolved, such as the insertion of appeal rights and reasonable time limits into the legislation, but others remain of serious concern. The timing for providing comments on the Consultation Paper and the first draft of the legislation was extremely tight and came at a time of year which made it difficult for us to appropriately brief and discuss these important issues with state and territory carers associations and their boards. Although a time extension was provided,

¹ <http://acnctaskforce.treasury.gov.au/content/communityengagement/downloads/commconsult2012.pdf>
slide 18

it was still not possible for us to consult as widely as we should with our member associations.

Current Bills

Following the public consultation, which widely criticised the draft legislation, we understand that some organisations were invited to provide further input to the Attorney-General's Department on the perceived deficiencies of the legislation. However, parties to these further consultations are bound by confidentiality agreements so are restricted in the information they can provide to members. This is not the way to engage the community sector.

The current draft of parts of the legislation (regulations which give effect to many of the Bills' provisions have not been provided) have now been released with a two-week deadline for comments. You will note that the explanatory memorandum alone runs to some 259 pages and has an entirely different numbering system to the legislation, making it more difficult to find the justification for specific clauses. Again, it will not be possible for us to properly consult with our members.

Fundamental Question regarding the objectives of the legislation

Whilst clearly the Commonwealth has the right to impose requirements on charities and not-for-profits in relation to taxation administration, this Bill goes a lot further. The fundamental premise that the charitable and not-for-profit sector is somehow rife with corruption; that public trust would be significantly undermined, should there be an instance of fraud, and that governance standards across the sector are inappropriate, is not supported by evidence. Instead, we would argue that the public's level of trust and confidence in the sector is reflected in the value of philanthropic donations and volunteer time.² Where there is a case of fraud, the normal criminal and civil law sanctions would apply to the individual or individuals involved, rather than their entire organisation. The charitable and not-for-profit sector should not be held to a higher standard than corporations, politicians, or public servants.

Primary Concerns concerning the Bill

1. Apparent lack of agreement by the states and territories to give effect to the reduction in red tape.
2. The enforcement sections of the Bill only being applicable to federally regulated entities or in relation to 'external conduct standards' due to lack of jurisdiction under the Constitution.
3. The proposed definition of charity effectively ignoring the High Court decision in *Aid-Watch* in relation to advocacy organisations.
4. Making registration with the ACNC a prerequisite for unspecified 'exemptions, benefits and concessions provided under other Australian laws' (i.e. state, territory and Commonwealth laws - s995.1 *Income Tax Assessment Act 1997*).

2

5. The potential Retrospective deregistration of a not-for-profit entity with the serious impacts this would have on the entity as a whole, but particularly on its employees.
6. The lack of any remedial compensation for an organisation wrongly deregistered unless they take action in the Federal Court.

Carers Australia remains committed to the establishment of a National Charities Commission for the not-for-profit sector; however, we do not support the Bill in its current form.

Detailed comments on the bill are attached.

Yours sincerely



ARA CRESSWELL
Chief Executive Officer

23 July 2012

**Comments on Australian Charities and Not-for-profits
Commission Bill July, 2012**

Preamble

As already mentioned, we dispute that the not-for-profit sector does not already have good governance, and accountability.

It is not clear how the ACNC will be able to demonstrate that it has, through the introduction of a regulatory system; maintained, protected and enhanced public trust and confidence on the not-for-profit sector. Are performance indicators envisaged? What will be used as baseline measures?

Explanatory memorandum 1.56

A number of the purported benefits to the sector appear illusory. It is clear that at least in the short term, until mutually agreeable arrangements are made with the states and territories, red tape will not be reduced. It is doubtful that a government webpage will improve public engagement with the sector. The ACNC does not appear to 'provide the sector with better protection from possible breaches of trust and confidence by a few' - instead it imposes a regulatory regime upon some not-for-profit entities in addition to the currently existing penalties under the criminal and civil codes.

Explanatory memorandum 1.64

Whilst this approach supports the mooted 'light touch' approach, it does not appear to be included in the legislation.

Explanatory memorandum 1.67

Again whilst laudable, the intention that the Commissioner will only exercise enforcement powers in a small number of cases does not appear in the legislation.

Explanatory memorandum 1.79 and 1.82

The Commissioner is to use the principle of proportionate regulation. This is commendable; however, although the term appears in a number of sections of the Bill, it is not defined. There should be a clear statement that it is intended to apply to the circumstances of the organisation, including its size, revenue, public donations, history and level of risk.

Explanatory memorandum 2.2

It is clear that there is no constitutional authority for the entirety of this Bill. Whilst significant parts of the Bill relating to Taxation do have authority, many of the enforcement powers will only be applicable to federally regulated entities because these fall within the corporations or territories powers. This will presumably necessitate a different

approach to organisations which are not federally regulated entities and result in potential confusion.

Explanatory memorandum 2.15

The claim that other sections of the Bill are based on a 'mixture of powers' seems overly confident, given the High Court's recent decisions in Williams³ and Pape.⁴

Chapter 1 - Introduction - Division 10-5 and 15-5(4)

Whilst it is not unreasonable for organisations wishing to access Commonwealth taxation concessions to be registered, the reference to 'Registration under this Act also being a prerequisite for other exemptions, benefits and concessions provided under other Australian laws' is of concern. As noted in the University of Melbourne's January 2012 submission "These references appear to expand the regulatory power of the Commonwealth". What is the intended scope of these requirements? Does it mean other Commonwealth laws? What is the constitutional basis for this approach? Is the Commonwealth stepping beyond its powers before having the power to legislate on these matters referred by state Governments? What implications does the decision in Williams⁵ have on this piece of far-reaching legislation?

Chapter 2 - Registration of Not-for-profit entities

20-5 (3) Refer to comments above in relation to registration being a prerequisite for other benefits and concessions.

25 -5 (5) Entitlement to Registration

Whilst the table does reflect the traditional types of charities in Australian law, it appears to completely ignore the recent High Court decision confirming that advocacy organisations such as Aid Watch can be considered as charities.⁶

30-25 Notifying outcome of application for registration

(b)Where the Commissioner refuses to register the applicant, the Commissioner should specify on what basis the application has been refused. Without this information, it will be difficult for the entity to successfully ask for a review of the decision, as under 160-5(c) they are required to state in their objection to the refusal 'fully and in detail, the grounds on which the entity relies'.

30-30 Date of effect of registration

It is not clear why the date of effect is not normally the date the Commissioner makes the decision. It could severely disadvantage entities

³ <http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html>

⁴ <http://www.austlii.edu.au/au/cases/cth/HCA/2009/23.html>

⁵ <http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html>

⁶ <http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html>

if the Commissioner decided to register them but not until a prospective date a considerable time into the future.

35-10 Revoking registration

(1) It is not clear what sort of elements or standard of proof is required for the Commissioner to 'reasonably believe' that an entity does not meet a condition.

It is difficult to understand how the Commissioner can know that an entity 'is likely to contravene' a provision of the Act or is 'likely to not comply'.

In revoking registration the Commissioner must take into account a number of matters including s35-10 (2)(e) 'the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise the public trust and confidence in the not-for-profit sector ...'. This is an extremely subjective opinion. We would dispute that any isolated incident by a not-for-profit entity would damage public trust and confidence in the sector as a whole. The public is more sophisticated than this would suggest.

There is no compensation payable under the Bill if an entity is found to have been wrongly refused registration or has been deregistered.

40-5 Commissioner to maintain Australian Charities and Not-for-Profits Register

The Commissioner is required to include information on the Register of an entity's governing rules (s40-5(1) (vii)). The definition in the Dictionary (section 900-5) is that the governing rules are written rules that:

- (a) govern the establishment or operation of the entity; and
- (b) can be enforced against the entity.

Will most entities governing rules be enforceable? By what authority are they enforced?

45-1 Simplified outline

This part of the Bill sets up 'minimum governance standards'. These standards will be contained in Regulations which are not yet provided, so it is difficult to say how onerous they may be or how reasonable. Failure to meet these standards is a condition of registration, and presumably potentially a reason for revocation of registration. A difficulty with this approach is that, being based on regulation and therefore relatively easy to amend, these standards may change at short notice. An entity which had been registered could find that immediately after an amendment to the standards that it was no longer eligible. There should be transitional arrangements put in place so that this situation can be ameliorated as far as possible.

45-10 Regulations establishing governance standards

It is not clear why the regulations will specifically not apply to a registered entity which is a 'basic religious charity', but will presumably apply to all other entities. Although the definition in s205-35 specifically excludes from the definition a religious entity that is incorporated or otherwise registered under other legislation, why isn't this approach also taken with other small organisations? There appears to be no rationale for the exception given for 'basic religious charities' throughout the Bill, and there is certainly nothing given in the explanatory memorandum.

Part 4-2 Enforcement powers

We have two main concerns about this Part. Firstly, the repeated use of phrases such as 'the Commissioner reasonably believes that the registered entity has contravened or *is likely to contravene*, a provision of this Act', and the potentially serious ramifications that a subjective decision such as this could have on a not-for-profit organisation. Secondly, it is quite clear that due to lack of Constitutional coverage the enforcement powers and governance standard regulations can only be used against federally regulated entities or where the organisation is subject to an 'external conduct standard'. This will clearly lead to a two-tiered approach to enforcement with some registered entities potentially subject to the enforcement and governance requirements, whilst others operating nearby with exactly the same situation will not. An entity which is registered in the ACT as a body corporate will be counted as a 'federally regulated entity' but a similar entity registered across the border in Queanbeyan will not. This is not an even handed approach.

We are concerned that the Commissioner can issue directions not only to the entity as a whole, but to individuals who play a part in decision-making such as CEOs, managers or Board members (s 85-10-(2)(a)). It must be remembered that Board members in particular are usually unpaid volunteers with an interest in the goals and principles of the not-for-profit organisation.

Division 120

The independence of the Australian Charities and Not-for-profits Commission is necessarily compromised by the administrative arrangements specifying the dependent relationship it is to have to the Commissioner of Taxation.

Division 165 - AAT Review of objection decisions and extension of time refusal decisions

165-10 Whilst exempting the Commissioner's decisions from section 27 of the AAT Act is justifiable, the proposed restrictions on the capacity of the Tribunal to hear stay applications and restricting the ability of the Federal Court to overturn decisions is not.

165-25 It is difficult to understand why the Commissioner would not be able to lodge:

'a **statement** setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'⁷

but, instead will provide a statement giving the reason for the objection decision. This may not give the Tribunal sufficient information upon which to base its new decision.

165-40 This says that unless the AAT orders otherwise, the appellant is limited to the grounds stated in the original objection to the Commissioner's decision. This approach seems to severely restrict the AAT's role of reviewing a decision on its merits and 'stand in the shoes of the original decision-maker'. An AAT review is meant to be a fresh inquiry into *all* the elements of the original decision.

⁷ *Administrative Appeals Tribunal Act (Cth) 1975 s37(1).*