Connecting Community Conservation

Conservation Council SA

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Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: community.affairs.sen@aph.gov.au

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: corporations.joint@aph.gov.au

Re: Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012 (and associated bills)

Please find attached a submission from the Conservation Council of SA to the above inquiry.

We would be happy to provide a further oral submission or provide further information if the Committee wishes.

Please contact me on Ph. 08 82235155 or email at tim.kelly@conservationsa.org.au, or Dr Greg Ogle (gregogle@senet.com.au) who is our Executive Committee member with carriage of this issue, if you have any questions or follow-up in relation to this submission.

Yours,

Tim Kelly
Executive Officer

Dr Greg Ogle
Members, Executive Committee

Submission on the Australian Charities and Not-for-profits Commission Bill 2012 (and associated bills)

Table of Contents

Introduction

The Conservation Council of South Australia (CCSA) is a peak body representing over 50 member groups whose main purpose is conservation and protection of the environment. Combined, these groups represent over 60,000 South Australians. CCSA is an independent, non-profit and strictly non-party political organisation that runs environment programs, researches and advocates in relation to environmental challenges and solutions, and educates and engages people about what they can do to help.

The establishment of the Australian Charities and Not-for-profits Commission and the regulatory regime proposed in the bills is relevant to the Conservation Council and the environment movement generally as the protection of the environment is a charitable purpose in law. Many environment groups (including CCSA) enjoy tax charity concessions and in some cases, tax deductibility for donations made to them. Many environment groups also receive government or private grants which require tax charity status. All those groups would therefore be required to be registered with the ACNC and would come under the regulation of the proposed Act.

We thank the Committee for the opportunity to comment on the bills as introduced to the parliament, albeit with very short notice. Given the timelines, we hope you will understand that this submission updates but draws substantially on submissions made in relation to previous drafts of the bills, in particular our submission to the House of Representatives Economics Committee inquiry on the Exposure Draft. In that submission we identified 4 key issues of concern:

- The framework and objects of the Act;
- Thresholds for categories in relation to the size of organisations;
- Governance standards; and
- Potential regulatory duplication.

We are pleased to see that a number of the concerns have been addressed in the current bill. We welcome the fact that the wording of the Preamble has been changed to remove some of the previous mischaracterisation of the not-for-profit sector, and that an object has been added to promote the reduction of unnecessary regulatory obligations on the sector. These changes do not address all our concerns, and we remain concerned that there is little content in the bill to reflect the support and red-tape reduction objects. In this sense the overarching framework and objects still reflect the compliance and enforcement starting points of earlier drafts rather than the key role the ACNC should have in supporting not-for-profit organisations.

However, beyond that broad framework issue, two specific issues remain outstanding that seriously compromise the potential benefits of the bill and our ability to be supportive of it. These are discussed below and we make recommendations for amendments to the bill.

Governance and External Conduct Standards

The biggest remaining issue of concern to the Conservation Council and the environment groups we represent is the governance standards and external conduct standards – or lack of them. As we noted in our submission to the House of Representatives Economics Committee,

> The problem is that we do not know what the standards are as they are to be enacted later as Regulations under the Act. While the governance standards may be quite sensible base level standards that all environment groups would hold themselves to, they may not be. A number of environmental groups have had experience in the recent past of government and tax office attempts to limit the scope of their activities, or to impose burdensome reporting requirements in grants. Accordingly, we are understandably concerned as to the content of these Governance Standards and External Conduct Standards. It is not just that the Conservation Council can not comment on the Exposure Draft as it relates to the standards, it is unfair to be asked to make any definitive comment on the Exposure Draft as a whole when we do not know the content of a key part of the regime which will potentially impact on environment groups.

We understand that there is to be further consultation in relation to the Governance Standards. ***We welcome this consultation, but the promise of consultation does not give certainty of processes or content***. Since the standards are to be in regulations, they will be able to be changed by future governments relatively easily and potentially without the consultation and co-operation of the sector. Given that environment groups and other charities will be required to assess themselves against such standards (which may involve significant changes to constitutions, by-laws or procedures) this does not provide certainty to enable not-for-profit organisations to plan and get on with their work. Further, given the past history of government seeking to limit advocacy through tax regulation, and the ongoing use of "gag" clauses in government contracts (requiring advocacy organisations to submit materials to government agencies prior to publication), the minimalist provisions of Division 45 in mandating that governance standards may be established by regulation is particularly unsatisfactory. Accordingly, we recommended in our previous submission that the Act should place some parameters or guidelines on the governance standards.

We have given further thought to this and consulted with other groups. We support the Australian Council of Social Service submission that a clause be added at 45-10 that:

> the governance standards must deal only with the minimum standards required to meet the objects of the Act and must:
>
> (a) be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation;
>
> (b) be in proportion to the size of the organisation and the level of financial, organisational and reputational risk;

(c) preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfil its functions;
(d) not prevent or constrain not-for-profit organisations from carrying out advocacy functions in pursuit of their purpose;
(e) where possible, not duplicate any regulatory requirement already in place.

In support this approach we note that it draws on the intention and wording stated in the Explanatory Memorandum and the format already proposed at 50-10(3) for the external conduct standards. We therefore ***recommend amending the bill to include such provisions.***

We also recommend that a similar approach be taken in relation to the external conduct standards. Many environmental challenges are international and a number of environment groups therefore operate or support campaigns outside of Australia. Again, the lack of any real content or parameters in the external conduct standards is a concern and we would like to see similar clauses as noted above added to s50-10.

Further, given the importance of the work and the broad scope of the charitable and not-for-profit sector, we would like to see as wide an input into policy development as possible. This is particularly important in relation to the governance and external conduct standards, but could apply to the Act broadly. In this context we note that the Advisory Board's function under s135-15 is only to provide advice to the Commissioner on request (although this would appear to be contradicted by s110-20) and we also understand that the function of the ACNC and the Commission is administration of the Act, not policy development in relation to the sector. That responsibility remains with Treasury, but Treasury would (understandably) have little knowledge or expertise in relation to the workings of environment groups and again, the not-for-profit sector is both very broad and diverse.

Accordingly, we would ***recommend*** that a provision be inserted into the bill to require that any regulations in relation to governance and external conduct standards may only be enacted after:

- consultation with the not-for-profit sector; and
- advice is taken from relevant Ministers.

Size of Organisations

The other major issue of concern, although perhaps not as fundamental as the governance and external conduct standards, is the thresholds defining the different categories of size of organisations (s205-25). There are a large number of small environmental organisations who have few or no professional staff, few assets and operate at a very local level. Of the Conservation Council's 50 members, only about a quarter employ any staff, and 37 have less than 100 members. Even the largest environment organisations in South

Australia are still relatively small by comparison with the large faith-based charities in the community services sector, let alone not-for-profit organisations and other entities in different sectors.

This is important because it is vital that the work of many of these groups, which is often done by local volunteers who come together simply to protect or restore a local environment, is supported and facilitated and not burdened by regulation which is out of proportion to their size, operation and the governance risks involved. If the governance standards are to be sensitive to different sizes of organisations, as proposed above and suggested in the Explanatory Memorandum, then the thresholds need to be right – and realistic.

We noted in our submission to the House of Representatives Economics Committee that the consultation process in relation to the ACNC will (naturally) have been dominated by larger organisations that have the resources to engage. We therefore recommended that the Committee consider the impact of the proposed legislation on small and volunteer run groups and also examine the range of input into the consultation process to determine whether the voice and concerns of small organisations have been adequately represented.

We note with disappointment that the organisations who were subsequently invited to make further oral submissions to the Committee were all large organisations, and that the organisation size thresholds in s205-25 have not changed in the bill currently under consideration. We continue to believe that these thresholds are too low and that this will result in regulatory burdens out of all proportion to the size of many environmental (and other) charities.

We therefore repeat our previous statements:

> The proposed threshold of $1m revenue for a large registered entity would mean that an organisation which employs about 6-8 staff with modest overheads and costs may be considered a large organisation. We do not believe this reflects community understandings of what constitutes a "large organisation", and that the community would not expect the same level of regulation and oversight of an organisation with 6 staff as it would for an organisation with hundreds of staff and a turnover of tens of millions of dollars. We also note that in the commercial sphere, the industry support body, Small to Medium Enterprise Australia Ltd, defines a small organisation as having a turnover of under $600,000 and fewer than 5 employees, while their medium business category starts at $2.5m annual turnover and over 15 employees.[1] These figures are more than double the thresholds proposed in the Exposure Draft.

In addition, we note that the *Income Tax Assessment Act 1997* defines a small business entity as one which has an aggregate turnover of less than $2m per

[1] http://www.smea.com.au/images/SMEA%20Partnership%20Form%202011.pdf

year (s328.110) – again, twice the threshold where a not-for-profit entity is considered to be a large entity in the ACNC bill. In light of this and the various other definitions, the treatment of this issue by the House of Representatives Economics Committee and the suggestion that there is an agreed or standard size definition is flawed.

The result of this flawed approach will be to impose an extra and unfair regulatory burden on many small organisations. For instance, a South Australian environment group (or other charity) with a turnover of $300,000 per year (ie. possibly hiring two staff) will be deemed a 'medium-size' entity under this bill and will therefore be required to have the annual accounts audited or externally reviewed. There is currently no such requirement under SA law and this may represent an extra cost and imposition on what is a quite small organisation. And again, we do not know what other requirements will be imposed on this organisation by governance standards for medium-size organisations.

We therefore recommend that the size thresholds in s205-25 of the bill be increased to better reflect the reality of organisational scale and to bring them into line with community and commercial understandings. We would suggest that a small organisation be one with revenue below $500,000p.a. (which is the threshold for a prescribed association in the South Australian *Associations Incorporation Act*). The threshold for a large organisation should be at least $5m p.a.

Conclusion and Summary of Recommendations

The Conservation Council supports the establishment of a national body which can support charities and provide a one-stop shop for charity regulation. We recognise the potential of the proposed ACNC as a key step in this process, but have raised issues which we believe undermine this potential and need to be addressed to fulfil the promise of the ACNC. Our specific recommendations are as follows:

1. That s45 be amended to place some guidelines or parameters on the regulations forming the governance standards along the following lines:
   the governance standards must deal only with the minimum standards required to meet the objects of the Act and must:
   (a) be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation;
   (b) be in proportion to the size of the organisation and the level of financial, organisational and reputational risk;
   (c) preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfil its functions;
   (d) not prevent or constrain not-for-profit organisations from carrying out advocacy functions in pursuit of their purpose;

(e) where possible, not duplicate any regulatory requirement already in place.

2. That similar guidelines or parameters be placed on the regulations forming the external conduct standards.

3. That a provision be inserted into the bill to require that regulations in relation to governance and external conduct standards may only be enacted after:
    a. consultation with the not-for-profit sector; and
    b. advice is taken from relevant Ministers.

4. That s135-15 be amended to allow the Advisory Board to give advice to the Commissioner on its own initiative.

5. The size thresholds in s205-25 of the Exposure Draft should be increased to better reflect the reality of the organisational scale and to bring them into line with community and commercial understandings. We would suggest that a small organisation be one with revenue below $500,000p.a. (which is the threshold for a prescribed association in the South Australian *Associations Incorporation Act*). The threshold for a large organisation should be at least $5m p.a.