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Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: economics.reps@aph.gov.au

Re: Australian Charities & Not-for-Profits Commission Bill 2012 – Exposure Draft

Thank you for the opportunity to comment on the second Exposure Draft of the Australian Charities & Not-for-Profits Commission Bill. Philanthropy Australia appreciates that many of the issues raised in the first draft of the Bill have been addressed in this version and commends the Government for its consideration of the issues raised during the consultation process.

Philanthropy Australia makes the following comments on the Exposure Draft.

1. Philanthropy Australia is vitally concerned that there should be nothing in the ACNC legislation that inadvertently diminishes the building of philanthropic culture in Australia. Philanthropy is vital for many community organisations that deliver social services which are unable to be delivered by the various levels of government. The return to the community is a multiple of the forgone tax revenue.

Philanthropy Australia has been a strong supporter of the Government's changes in the sector for Private Ancillary Funds (PAFs) in 2009 and Public Ancillary Funds (PuAFs) in 2011. PA has expended considerable effort and resources to promote philanthropy, explain the regulatory changes and actively promote compliance, including through seminars and the development and dissemination of free trustee handbooks.

PA strongly endorses the principles that underlie sector reform through the ACNC:

- deliver smarter regulation;
- reduce red tape; and
- improve transparency and accountability within the sector.

However, support is on the basis that the principles of accountability and transparency should be applied as they are in Australia's wider institutional framework:

Accountability to the taxpayer for any taxation concessions. Both the PAF and PuAF Guidelines meet this requirement through annual tax returns (based on audited accounts) which include details of donations and organisations supported and a penalty regime for non-compliance.

Transparency to the public where they are direct users: ASIC and ASX rules are different for publically listed companies and private companies, based on their ability to access public funds, not their taxation concessions. Financial services regulations for deposit taking institutions require more disclosure than for other activities. Charities that solicit funds from the public are required to be more transparent than those that only access private money. Treasury in its February 2012 report on Charitable Fundraising Reform on p18 recognises that some forms of

PHILANTHROPY
Australia

charitable giving should be treated differently from a fundraising perspective – such as by religious organisations seeking funds from their members.

PAFs explicitly cannot solicit funds from the public. The vast majority of donations come from the Founder and his/her family, so there is a clear nexus between who controls a PAF and where the money has come from (which is absent from other charities). They are *private* trusts.

Philanthropy Australia therefore supports the sentiment set out in paragraph 4.34 of the Explanatory Material for the Minister to make regulations which address the privacy concerns of philanthropic donors and other entities. This is an important initiative which will ensure the continuity of philanthropic engagement in Australia and will build on the current incentives to encourage greater numbers of Australians to establish permanent giving structures which will irrevocably sequester some of their wealth for the benefit of charities.

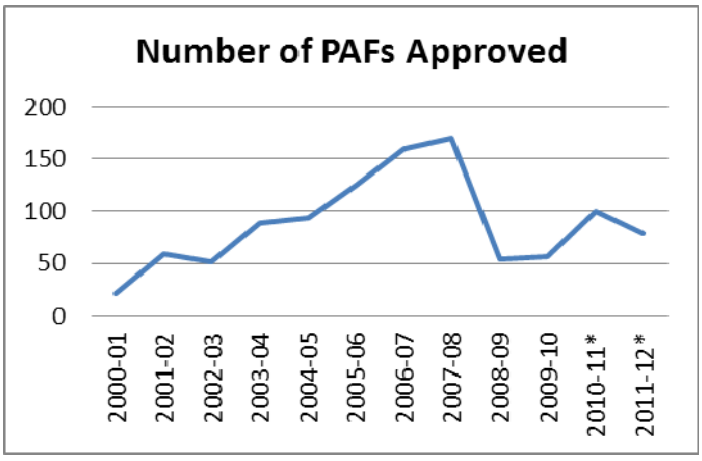
Philanthropy Australia does have concerns regarding the provision in Clause 40-10 (2) in the legislation which suggests that the Commissioner has discretion to still publish the information if she/he considers it is in the public interest to do so. It is to be assumed that the Minister would only make such regulations if in the public interest and therefore seems illogical to leave the Commissioner with discretion to override them. It would be preferable from the perspective of current and prospective ancillary fund donors if there was a firm direction on this issue so as to provide them with certainty to proceed.

The PPF Review specifically examined the question of public reporting for PAFs. This was rejected and the following Guideline (8) adopted:

"(A PAF) is, open, transparent and accountable to the public (through the Commissioner)

Note: This does not affect the Commissioner's obligations to protect the confidentiality of taxpayers' information under taxation secrecy and disclosure laws."

At a time of constrained budgets, Australia needs more philanthropy, not less. During the 2009 PPF review and straight afterwards, few PPFs/PAFs were established because of the uncertainty surrounding the regulatory framework (see below), although the GFC also clearly contributed.



Source: ATO Taxation Statistics (*estimates based on DGR data, 2012 as at 22 June)

PHILANTHROPY
Australia

A return to such an environment due to the new ACNC legislation would be to the detriment of the not-for-profit sector and the Australian community more widely. Peter Winneke, Head of Philanthropic Services, Myer Family Office, who manages more PAFs than any other organisation, has stated on the public record: “Nearly everyone we talk to say they won't set up a PAF if privacy is abolished, and many of the existing PAF founders that we deal with say they will close their PAF down if their privacy is compromised”.

We reiterate that we are not seeking an exemption with regards to PAFs lodging information with the ACNC or reducing regulation of PAFs by the ACNC/ATO. We simply ask that the private information about private charitable trusts controlled by families is not included on the public register.

While some families wish to showcase their philanthropy to show leadership, many others are much more discreet. One of the great strengths of philanthropy is its diversity. The current PAF framework gives families the choice to be public or private about their philanthropy. This is no different to individual donations to charities. Otherwise it would be necessary to argue that *all* donations to all charities should be a matter of public record.

We cannot see any policy benefit in requiring public disclosure of private information about private trusts, particularly given this was explicitly rejected in 2009. There is a significant danger that such a change, if implemented, would cut short the building momentum of community engagement and philanthropy in Australia, because public disclosure is strongly opposed by many who of those who already have PAFs and those who have the interest and capacity to set one up. Philanthropy is by definition a long term pursuit and the regulations should support and help grow private as well as public giving.

In order that this uncertainty be removed Philanthropy Australia recommends that there be a clear public statement on the regulations as soon as possible.

Recommendation 1: That “(e)” be removed from the last line of section 40-10 (2) of the Bill, so it will now read … “1 (a) to (d).”

Recommendation 2: That the Minister make a public statement, clarifying that the regulations will contain provisions to guard the privacy of private philanthropists, as soon as possible and definitely prior to the Standing Economics Committee public hearings.

2. Further to the above, we note that a registered entity's governing rules (trust deed) will be made available to the public via the portal. Governing rules, particularly for PAFs, usually contain the Donor (Founder's) full name and address even where the Founder is not a Trustee. It would be preferable if this section of the governing rules were able to be withheld to guard the privacy of such individuals.

Recommendation 3: That the section of governing rules containing the Founder’s name and address be withheld from appearing on the public register.

3. The Bill and Explanatory material state that the ACNC will initially be responsible only for registering charities. This implies that Private and Public Ancillary Funds which are not charities – those either endorsed as Income Tax Exempt Funds or those without any income tax exemptions – will not need to register with the ACNC at least initially.

Philanthropy Australia would like some clarification on whether this is the case. If so, does it mean that charitable Ancillary Funds will need to report twice for the foreseeable future, as all Ancillary Funds must file returns with the ATO? If charitable PAFs and PuAFs must report to the ACNC as of December 2014,

PHILANTHROPY
Australia

will this release them from the obligation to also report to the ATO, or will they effectively be reporting twice for the duration? It is worth noting that many PAFs will have income below the ACNC audit thresholds, but will still require audit under the PAF Guidelines. There are also some specific compliance, audit and reporting requirements in the respective Ancillary Fund Guidelines which would not be appropriate for other charitable trusts or charities.

Recommendation 4: That there to be one form of reporting for Ancillary Funds which could be accepted by both the ACNC and the ATO (although clearly not all information in such returns should be made public).

4. Further to the above question, will there be provision for Income Tax Exempt Funds and other not-for-profits to register with the ACNC even if they are not charitable? This may be an issue particularly for Public Ancillary Funds which can be endorsed as ITEFs but are required by law to fundraise. They may wish to voluntarily register with the ACNC; as the ACNC becomes the central hub for donors seeking information on well-managed and responsible organisations to donate to, Income Tax Exempt Funds may be disadvantaged if donors who do not understand the intricacies of their differing status see that they are not listed on the public portal.

Recommendation 5: That Income Tax Exempt Funds which are DGRs may voluntarily choose to register and be listed on the ACNC's public information portal.

5. Philanthropy Australia would appreciate clarification of whether the provision for collective or joint reporting will apply to charitable trusts which have the same trustee and the same types of activity. This is of particular relevance to trustee companies which in some cases administer a large number of trusts. If each individual trust is to be considered a separate registered entity, this would require each trustee company to prepare and lodge a very significant number of separate statements and reports on an annual basis.

Recommendation 6: That there be clarification of whether a group of trusts with the same trustee and the same activity will be able to take advantage of the collective reporting provisions.

6. We can see the logic of classifying charities by area of activity but note that charitable trusts often fund multiple programs in very different spheres which can change year to year, and are therefore different from other charities with a specific charitable purpose. The purpose of endowed charitable trusts is very different to those charities designed to directly deliver services and benefits (other than money) to the community, and the reporting regiment should reflect the purpose for which these entities are designed and the existing regulations under which they already operate and to whom they already report.

Recommendation 7: That the funding of multiple and varying activities by charitable trusts is taken into account when designing the reporting framework.

7. Philanthropy Australia would like clarification around the provisions in the Bill for removal or suspension of responsible entities where the entity in question is a trustee of a charitable trust. For the ACNC to be have power to suspend or remove a trustee of a charitable trust seems to create a conflict with existing law, under which a trustee of a trust may only be removed in accordance with the trust instrument or by order of the Supreme Court in its equitable jurisdiction where a breach of trust has occurred.

PHILANTHROPY
Australia

Philanthropy Australia notes that Subdivision 143-B from the previous iteration of this Bill, which explicitly empowered the Commissioner to suspend or remove trustees, has been removed from this revised version but the question of which jurisdiction has precedence is still unclear.

Recommendation 7: That clarification be issued regarding this matter of conflicting jurisdictions.

8. Philanthropy Australia looks forward to the opportunity for further active consultation on the draft Regulations when they become available.

Yours sincerely

Dr Deborah F Seifert
Chief Executive Officer