



AUSTRALIAN DENTAL
ASSOCIATION INC.

Australian Dental Association Inc.

ACNC Exposure Draft Legislation Submission

Department of the Treasury

20 January 2012

**Authorised by
Dr F Shane Fryer
Federal President**

Australian Dental Association Inc.

**14–16 Chandos Street
St Leonards NSW 2065
PO Box 520**

St Leonards NSW 1590

Tel: (02) 9906 4412

Fax: (02) 9906 4676

Email: adainc@ada.org.au

Website: www.ada.org.au



Australian Dental Association

ACNC Exposure Draft Legislation Submission

1. About the Australian Dental Association

The Australian Dental Association Inc. (ADA) is the peak national professional body representing about 13,600 registered dentists engaged in clinical practice and dentist students. Practising ADA members work in both the public and private sectors. The ADA represents the vast majority of dental care providers.

The primary objectives of the ADA are to:

- Encourage the improvement of the oral and general health of the public and to advance and promote the ethics, art and science of dentistry; and
- To support members of the Association in enhancing their ability to provide safe, high quality professional oral healthcare.

There are ADA Branches in all States and Territories other than in the ACT, with individual dentists belonging to both their home Branch and the national body. Further information on the activities of the ADA and its Branches can be found at www.ada.org.au.

2. Introduction

The ADA welcomes the opportunity to provide comment on the Exposure Draft Australian Charities and Not for Profits Commission (ACNC) Bill 2011 (the Bill). The Bill will create the legislative framework to support the establishment and implementation of an Australian regulator for charities and the not-for-profit sector. The ADA recognises that the ACNC's aim is to streamline the governance, accountability and transparency of Not for Profit (NFP) entities by the creation of a consistent regulatory and reporting framework for the sector.

The comments made by the ADA in this submission are based on consultations with its members and with its State and Territory Branches. We trust the ADA's comments provide a constructive contribution to the further refinement and implementation of the ACNC.



3. Executive Summary

Recommendation 1: That the Bill not be framed or used in a way that empowers the ACNC to micromanage the affairs of registered entities, or to “second guess” operational decisions that are best determined by the charitable entities themselves.

Recommendation 2: Ensure that the definition of “charity” does not exclude lobbying activities which can be justified as a natural part of organisations’ pursuit of their foundational charitable or NFP purpose and/or operations.

Recommendation 3: That the sections relating to the ACNC’s ability to revoke registrations explicitly requires the consideration of all the relevant circumstances that exist regarding the entity under scrutiny.

Recommendation 4: That the Bill seeks to unify the criteria that are required to be met for specific Commonwealth grants or government service-delivery contracts.

Recommendation 5: Remove the strict liability penalties associated with breaches for reporting obligations; or alternatively provide greater discretion by providing a graduated penalty scale that can be applied to such breaches.

Recommendation 6: Allow sufficient scope for any changes in the reporting framework to reflect the operations of the entity.

Recommendation 7: Develop adequate protocols that are communicated to the NFP sector on the ACNC’s approach to special purpose reporting, noting that resources are scarce and will need to be dedicated towards answering such queries. Where special report requests are made, either to individual entities or to a class of entities, the Bill should require written notice to be made to those entities, not notice by website notification. Also provisions need to be drafted to require greater transparency on the reasons for which special purpose reports were requested, and how these powers were exercised by the ACNC.

Recommendation 8:

- That the ACN register only contain notices that are final and are not subject to existing challenge/investigation; and
- That the Bill:
 - Require greater weight to be given to the potential damage that release of information could have on a particular entity when considering whether or not the information should be included on the register; and
 - Include a provision which requires the Commissioner to notify affected registered entities on decisions to include details and/or allow such entities to make application requesting certain information not be published publicly.

Recommendation 9: That adequate checks and balances be put in place for the use of notices, warrants, direction, and suspension/removal of trustees/reasonable individuals. Notices need to have a time limit (such as one month), and the ACNC needs to justify their continued use.



Australian Dental Association

ACNC Exposure Draft Legislation Submission

Recommendation 10: That the government's future planned confidential consultations on remaining aspects to the Bill be open to the public.

Recommendation 11: Require that the Commissioner "must" have regard to the Advisory Board's advice/recommendations. If the Commissioner is to not accept the Advisory Board's advice/recommendations, a provision should be put in stating that the Commissioner "must" provide reasons for such action.

Recommendation 12: That the Advisory Board have at least 5 members, two of which must have "experience and appropriate qualifications in relation to law, taxation or accounting". The remaining two members must have appropriate expertise/experience to charities/NFP entities and one member must be from the community.



4. Chapter 1: Introduction

The ADA supports the ACNC's aims and the creation of an informational portal which will be the central reference point for information on and for the NFP sector to strengthen accountability and transparency. This plan for the ACNC to be a 'one stop shop' is appropriate. Similarly, the adoption of a governance framework which will outline the principles and practices to ensure such entities achieve their objectives in an effective and transparent manner is supported.

Recommendation 1: That the Bill not be framed or used in a way that empowers the ACNC to micromanage the affairs of registered entities, or to "second guess" operational decisions that are best determined by the charitable entities themselves.

5. Chapter 2: Registration of not-for-profit entities

Entitlement to registration

The Bill states a number of purposes are legitimate for registering as a charity with the ACNC. A list is then provided of appropriate purposes for entities to fulfil this requirement.

One such purpose includes:

"32. Community service purposes (except political or lobbying purposes)"

While the ADA's own purpose concerns the advancement of health, the ADA notes that there is no definition of what constitutes 'political' or 'lobbying' activity. These terms require definition. Charities and benevolent institutions rightly can represent their members or pursue their altruistic purposes by advocating to government and politicians. To frame the Bill in a manner which could allow effectively the silencing of certain organisations on the basis of how well they lobby or communicate with government is concerning. Recognition of this must be given.

Recommendation 2: Ensure that the definition of "charity" does not exclude lobbying activities which can be reasonably justified as a natural part of organisations' pursuing their foundational charitable or NFP purpose and/or operations.

Revoking registration

While the ADA notes that the provisions relating to the ACNC being able to revoke charities' registration will only be used after taking all relevant factors into account, the Bill should explicitly require this.

Recommendation 3: That the sections relating to the ACNC's ability to revoke registrations explicitly require the consideration by the ACNC of all the relevant circumstances that exist regarding the entity under scrutiny.

6. Chapter 3: Duties of registered entities

'Report- once use-often' reporting framework

While the ADA supports the 'report-once use-often' reporting framework, it does not recognise how the Bill or the ACNC itself will do this. The ADA recognises that in terms of ongoing reporting to the ACNC some key documents can be re-used without having to do additional work. The ADA urges government to be clearer on how ACNC reporting mechanisms will satisfy not only the tax concessions aspect of applications, but how (if at all)



ACNC Exposure Draft Legislation Submission

this information can be used to satisfy requirements with respect to continuing eligibility for specific Commonwealth grants or government service-delivery contracts. While the ADA acknowledges that some form of separate reporting will need to occur to fulfil accountability requirements to those separate sources of funding, the Bill does not outline how these efficiencies will be achieved through reporting to the ACNC beyond the reporting on the general operation of the entity to the public.

Recommendation 4: That the Bill seeks to unify the criteria that are required to be met for specific Commonwealth grants or government service-delivery contracts.

Penalties for breaching reporting requirements

The 30 penalty unit punishment for failure to comply with reporting requirements in the Bill is excessive. While the ADA notes the rationale is to provide a strong incentive for compliance, it is too onerous a penalty for the offence. A more proportionate approach consistent with the general theme of the Bill should be adopted.

Recommendation 5: Remove the strict liability penalties associated with breaches for reporting obligations; or alternatively provide greater discretion by providing a graduated penalty scale that can be applied to such breaches.

A proportionate approach to characterising the size of entities

While the ADA supports the notion of proportionality for the general purpose reporting framework, the ADA recommends sufficient scope be included in the Bill to reflect not only the range of particular sizes of entities in the sector, but also the extent to which their operational realities are such that they would warrant compliance with certain requirements or would have the resources to comply with the graduated reporting requirements.

Recommendation 6: Allow sufficient scope for any changes in the reporting framework to reflect the operations of the entity.

Special purpose reporting

While this provision allows for the reporting of information beyond general purpose reporting, the ADA notes that it should be used sparingly; especially considering how far back in the past such a special purpose information request can go (up to six years).

The ADA notes that the ACNC may require registered entities to lodge special reports by potentially providing notice of this on the ACNC website. The ADA opposes such form of notice. It suggests written notice be provided on all occasions.

Recommendation 7: Develop adequate protocols that are communicated to the NFP sector on the ACNC's approach to special purpose reporting, noting that resources are scarce and will need to be dedicated towards answering such queries. Where special report requests are made, either to individual entities or to a class of entities, the Bill should require written notice to be made to those entities; not by website notification. Also provisions need to be drafted to require greater transparency on the reasons for which special purpose reports were requested and how these powers were exercised by the ACNC.

7. Chapter 4: Regulatory powers of the ACNC

Australian Charities and Not-for-profits register

The ADA supports the range of information that will be put on the Australian Charities and Not-for-profits (ACN) register but notes with great concern the ability for the ACN register to include information on warning notices and fines issued by courts for breaches. Reputational



ACNC Exposure Draft Legislation Submission

damage can occur if it so happens that notices/determinations are challenged and those challenges are upheld. A 'name and shame' approach is not appropriate in the not-for-profit sector.

The ADA supports the range of discretion allowed to remove information from the ACN register on the basis that the information is commercially sensitive. While the legislation is relatively silent on how much weighting is given to each factor, noting the Commissioner *"must consider whether the public interest from the disclosure outweighs any potential adverse effect associated with the release of the information under question"*, the ADA is concerned that any damage caused by disclosure may in fact be too much damage when it comes to the reputation or operational decisions of NFP organisations. Decisions that publish too much information could have effects which are irreversible. Furthermore, the Bill does not detail a process by which those affected entities can make representations on whether certain information should not be disclosed.

Recommendation 8:

- That the ACN register only contain notices that are final and are not subject to existing challenge/investigation; and
- That the Bill:
 - Require greater weight to be given to the potential damage that release of information could have on a particular entity when considering whether or not the information should be included on the register; and
 - Include a provision which requires the Commissioner to notify affected registered entities on decisions to include details and/or allow such entities to make application requesting certain information not be published publicly.

Education, compliance and enforcement

The ADA is greatly concerned that the emphasis of the Bill is on the enforcement role of the ACNC rather than the educative role that government claims it will perform. The Bill imposes excessive administrative oversight over the charities/NFP sector. The Bill, by replicating powers and frameworks that apply in the context of corporations in Australia is a disproportionate and inappropriate policy response to the nature of the charities/NFP sector and disregards the different varieties of operating models and practices adopted to deliver on their altruistic purposes. This runs counter to the government's intention to adopt the simplified charities/NFP sector specific approach that is outlined in the explanatory memorandum.

Recommendation 9: That adequate checks and balances need to be put in place for the use of notices, warrants, direction, and suspension/removal of trustees/reasonable individuals. Notices need to have a time limit (such as one month), and the ACNC needs to justify their continued use.

Reviews and appeals

Like other sections of the Bill (outlined below) it is noted through the Exposure Draft and fact sheets that this part is yet to be drafted.

While government has stated that confidential consultations will be made with select parties on these provisions, the ADA questions why it is that open consultations are not adopted, considering the intention of the Bill is to foster transparency and accountability to the charities/NFP sector.



ACNC Exposure Draft Legislation Submission

Recommendation 10: That the government's future planned confidential consultations on remaining aspects to the Bill be open to the public.

8. Chapter 5 and 6: The ACNC and the Advisory Board

Commissioner's relationship with the Advisory Board

The Bill provides the Commissioner with too much discretion in considering the advice of the Advisory Board. The Bill states the Commissioner *"may have regard to the advice and recommendation of the Advisory Board in carrying out their functions/powers"*. The ADA believes compliance with the Advisory Board's decisions should be required or at the very least the Commissioner is obligated to disclose reasoning for not following the advice or recommendation.

Recommendation 11: Require that the Commissioner *"must"* have regard to the Advisory Board's advice/recommendations. If the Commissioner is to not accept the Advisory Board's advice/recommendations, a provision should be put in stating that the Commissioner *"must"* provide reasons for such action.

The Advisory Board

The Bill requires the Advisory Board have at least two but no more than 8 members other than ex officio members. The ADA recommends there be at least 5 members, two of which should be from the charity/NFP sector and one a member of the community.

Furthermore, it states *"members must have expertise relating to charities and NFP entities, and experience and appropriate qualifications in relation to law, taxation or accounting"*. The ADA believes this qualification requirement is too restrictive and should allow for those with extensive charities/NFP experience (while not holding a formal technical qualification) to be able to participate on the Advisory Board.

Recommendation 12: That the Advisory Board have at least 5 members, two of which must have *"experience and appropriate qualifications in relation to law, taxation or accounting"*. The remaining two members must have appropriate expertise/experience to charities/NFP entities and one member must be from the community.

9. Chapter 7: Miscellaneous

Secrecy provisions

The ADA has no particular comments on this section.

Consequential amendments; transitional provisions and the Regulatory Impact Statement

The ADA refers to its Recommendation 10 calling for an open consultation process once these remaining provisions are drafted by government.

The ADA trusts the section relating to the regulatory impact statement would adequately illustrate how efficiencies via reduction in regulatory/compliance burden would occur as a result of the ACNC.



10. Conclusion

The ADA supports the introduction of a national regulator for the charities and NFP sector, the ACNC. It supports the aims of the regulator to be ultimately a one-stop shop for charities and NFPs as well as the public to access information on this sector. Transparency, accountability and information sharing would ultimately result in better administration of not only the operations of these entities, but to ensure that all monies, whether from government or donors/members, are used efficiently and in accordance with these entities' altruistic purpose.

The ADA's concerns outlined in this submission however relate to the overall risk that the Bill, as outlined by the Exposure Draft, allows for the curtailment of legitimate operational activities that would further charities' and NFP's goals: namely lobbying or corresponding with government on matters which have a direct impact on these entities' activities and interests.

The Bill proposes a wide range of enforcement powers which the ADA views to not only be excessive but to lack provision of checks and balances which should underpin them. The ADA contends that the provision of a range of powers that allow for the ACNC to appropriately and proportionately respond to issues impacting on the sector should be buttressed by rigorous checks and balances of their own.

What makes the presence of the wide range of the ACNC's enforcement powers outlined by the Bill particularly concerning is that they allow considerable scope for the ACNC to make judgments on the operations of charities/NFP's to which the ACNC may not have adequate expertise. This is similarly reflected in the Commissioner's relationship with the Advisory Board, where the Commissioner "may disregard" the Board's advice. The ADA recommends membership of this Board should be increased, and the criteria for membership be expanded to allow for those with charity/NFP sector experience (that do not have attendant accounting/tax/legal qualifications) to offer their expert advice.

Dr F Shane Fryer
Federal President
Friday 20 January 2012.