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Attention: Mr Chris Leggett

Submission on the Review of Not-For Profit Governance Arrangements Consultation Paper and the Exposure draft of the Australian Charities and Not-for-Profits Commission Bill

Carers Australia welcomes the opportunity to provide comments on the Review of Not-For-Profit Governance Arrangements Consultation Paper, and the Exposure Draft of the Australian Charities and Not-for-Profits Commission Bill.

Carers Australia supports the Government's commitment to reform of the not-for-profit sector. We are keen to continue taking an active part in shaping a new regulatory regime that will ensure appropriate accountabilities, but at the same time will recognise the unique contribution that not-for-profit organisations make to Australian society. Carers Australia made a strong submission to the Productivity Commission's Inquiry into the Contribution of the Not-for-Profit Sector in June 2009 and has been an active supporter of the National Compact with the Not-for-Profit Sector.

We have therefore approached these two documents with some concern, for three reasons:

- There has been very little time to consider the documents in any depth or to consult within our stakeholder organisations
- The states and territories have not yet reached agreement on the role of the Australian Charities and Not-for-Profit Commission and so there is a lack of an agreed framework for progressing the reforms
- There appears to be a rush to establish the Commission without a fully considered model of how the new regulatory regime will work in practice - and this is clear from the number of gaps in the exposure draft bill.

Carers Australia supports the introduction of the Australian Charities and Not-for-Profit Commission. We see it as being the basis for a nationally consistent regulatory regime for the sector and at the same time it will have a valuable educative role in providing guidance on governance and related issues for the sector.

Having said that, however, we believe that it is extremely important not to rush the introduction of a new regime without providing appropriate opportunities for consultation with the sector – and the community at large. We understand the desire to establish the Commission as soon as possible, but we would suggest that it would be better to establish the Commission with an interim mandate to develop the principles-based approach referred to in Ministerial statements within a specific timeframe. This way, other elements of the reform agenda could be taken into account, in particular new definitions of 'charity' and 'not for profit', the review of tax concessions, the review of reporting requirements and the review of the suitability of the company limited by guarantee structure. In addition, there would be time to work with COAG to develop a national approach to fundraising and to learn from their experience of regulating the sector over many years.

We have had the opportunity to read the two submissions from the University of Melbourne Law School Not-for-Profit Project on the Consultation Paper and the Exposure Draft. We believe that they provide both a very comprehensive analysis of the issues and identify the changes necessary to ensure a workable Act and sector and community acceptance of the Commission.

Carers Australia agrees with their recommendations.

In addition, however, we have some general and a few specific concerns on certain aspects of the Consultation Paper which follow. Our comments on the Exposure Draft are at Attachment A.

General Issues

1. The Consultation Paper refers to the Australian Charities and Not-for-Profit Commission (ACNC) working to 'improve public trust and confidence in the sector, through promoting governance, accountability and transparency of the not-for-profit (NFP) sector'. How will the ACNC know it has achieved this objective? What evidence is currently available regarding the public's trust and confidence in the sector? Our view is that the Australian public's level of confidence and trust in the sector is reflected in the value of philanthropic donations and volunteer time.¹ As noted in the submission by the Not-for-Profit

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Project, 'there is no suggestion of a governance crisis in NFPs that necessitates immediate action.'²

2. There seems to be an assumption that if there were a large case of fraud within a NFP organisation, this would significantly undermine the general public's faith in the sector as a whole and be reflected in reduced donations across the broader NFP sector. There does not appear to be any evidence for such an assertion. The general public assumes that criminal or civil law sanctions will be imposed on individuals guilty of fraud or serious misconduct.
3. The term 'public monies' appears to be used sometimes to refer to donations from the general public and sometimes to either direct and indirect (through tax concessions) government assistance and funding. For some organisations, such as ours, the vast majority of funding is from Commonwealth Government Departments and as such is subject to stringent accounting processes.

More detailed comments

Point 90 in a broader discussion of a 'responsible individual's duties' makes the point that having appropriate duties would help to 'keep the entity operations focused on its mission, and operating for its cause and not the interests of the responsible individuals'. Whilst we would certainly agree with the sentiment, it is not clear, given the extremely broad scope of the proposed 'activities statement' in the annual information statement, how this will be monitored.

Consultation question 2 asks whose interests the 'responsible individual' of a NFP is to take into account when exercising their duties. We believe that 'the public' is such a broad concept that it should not be used in this context. As has been pointed out in considerations of the definition of charity, the interests of sectors of the 'public' and the interests of the potential beneficiaries of the NFP could be different. For example an NFP providing housing for low income substance abuse individuals may be vehemently opposed by local residents who fear direct and indirect perceived ramifications for their property values. It could be very difficult to reconcile these competing interests. In general, we believe that the NFP should put the interests of fulfilling its mission ahead of the assumed interests of the general public, otherwise it will not be able to effectively act and advocate on behalf of those it seeks to represent.

Consultation question 5 asks whether responsible individuals should be required to hold particular qualifications or have particular experience or skills. For many NFPs this would prove difficult to achieve. The individuals sitting on Carers Australia's Boards are unpaid volunteers who have taken on the role because they have a deep interest in promoting carer wellbeing and carer issues.

We would have considerable difficulty obtaining sufficient volunteers if we had to specify particular qualifications or experience as a

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requirement. What potentially may be gained in terms of a greater understanding of technical issues would almost certainly be lost in terms of the capacity to draw upon the lived experience, passion and commitment that these individuals bring to their roles.

We strongly agree with the analysis contained in the Not-for-Profit Project's submission regarding why NFPs are different in terms of governance.³ It is extremely important that the mission-based nature of NFPs, the interests of multiple stakeholders and the accountability issues these factors entail are properly acknowledged.

Point 106 suggests that the current lack of transparency may lead to a loss of donations and lower levels of volunteering. This seems to be contradicted by the fact that Australia currently has one of the highest levels of volunteering in the world,⁴ and substantial philanthropic donations.⁵ There does not appear to be any objective proof of an existing or looming 'crisis of confidence' in the NFP sector.

Thank you for the opportunity to provide comments on the Review of Not-For Profit Governance Arrangements Consultative Paper and the Exposure Draft of the Australian Charities and Not-for Profits Commission Bill 2012. If you have any queries in relation to these comments, please contact myself, or our policy advisor, Susan Taylor.

Yours sincerely



ARA CRESSWELL
Chief Executive Officer

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http://tax.law.unimelb.edu.au/files/Submission_on_Governance_Arrangements_final.pdf

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http://www.volunteeringaustralia.org/files/JACTB19T7V/SWVR_Report_Eng_2011.pdf_p19

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<http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=statistics.htm>

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 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.

Comments on Australian Charities and Not-for-Profit Commission Exposure Draft Bill

A general comment is that it is very difficult to analyse an exposure draft of legislation which has so many crucial elements still being drafted. Of particular interest to the NFP sector will be: the review and appeals provisions; the penalties to apply to corporate responsible individuals; criminal and administrative penalties; and the transitional arrangements for existing NFPs which may be covered by the ACNC.

These difficulties have been exacerbated by the explanatory materials and the exposure draft not 'lining-up' in terms of subject matter, headings or issues.

Chapter 1 – Introduction

Part 1-1

Division 2 – Objects, functions and application

2-5 Object

(1) Whilst this is laudable, it is not clear how the ACNC will be able to demonstrate that it has met the object of promoting 'public trust and confidence in not-for-profit entities that provide public benefits' to a greater extent than currently exists.

The term 'public benefits' does not appear to be defined, yet is crucial to both this section and the following section referring to the Functions of the Commissioner.

We support recommendation 7 in the Not-for-Profit Project's submission⁶ on the Exposure Draft to re-frame the statutory object. We believe that this would more comprehensively reflect what should be the aims of the legislation.

(2) Although promoting accountability is supported, there will be practical difficulties in stipulating how an entity will be accountable to the public in general. This will be problematic for many entities which are created and exist for the purpose of advocating or assisting particular groups in perceived need or for a particular cause.

2-15 Constitutional limits

It is difficult to understand why the Government has chosen to progress this Bill before reaching agreement with COAG in relation to possible referral of state powers under s51(xxxviii) of the Constitution.

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Although this situation is acknowledged on page 4 of the explanatory materials, it does seem that by proceeding with legislation and setting up the ACNC prior to state agreement, the Commonwealth is indeed both 'instituting a new layer of bureaucracy' and 'pre-empting a model to which COAG may agree'.

Division 5 – Entitlement to registration

5-10 Entitlement to Registration

This section should also refer to the entity being an entity which meets the requirements of paragraph 2-15(b), i.e. a constitutional corporation (as defined in the Dictionary in section 900-5) or trust where all the trustees are constitutional corporations.

Division 10 – Process of registration

10-20(2) This refers to an application being treated as refused 'after the time worked out under subsection (3)'. Subsection (3) gives a 60 day time period before an applicant can automatically treat their registration application as having been refused, unless additional information has been requested, in which case it may be extended for up to an additional 28 days from the time the applicant has provided the requested information. There should be a limit to the number of times that the Commissioner can ask for additional information, otherwise the application could continue unassessed for an extended period.

For administrative and clarity purposes it would be useful for the section dealing with the Commissioner requiring specified information or a specified document to set out time frames for both decision-making and responses. For example, allowing the entity a period of perhaps 3 months to respond to the request and after that date automatically refusing the application.

10-35 Review of refusal of registration

This proposes using the same approach as Part IVC of the *Taxation Administration Act 1953*. Under that Act, paragraph 14ZU(c) requires the person objecting to 'state in their application, fully and in detail, the grounds that the person relies on'. To do so the applicant will need to know the actual reasons for the rejection of the registration in order to produce a rebuttal. It does not appear that the Commissioner is required to provide this information to entities whose registration has been refused.

The process appears to allow for the Commissioner to initially review the decision, followed by appeals to either the Administrative Appeals Tribunal or the Federal Court. Clearly, this could potentially be an extremely lengthy process. Will there be capacity for restitution to be made to the entity for loss of income/capacity if it is subsequently found to have been registerable and therefore eligible for taxation

relief or entitled to apply for Commonwealth Government tenders and grants during the interim period? How will such restitution be calculated?

There are costs involved in appealing to both the AAT and to the Federal Court. Should these be waived/ exempted for NFP entities who are disputing a decision/non-decision by the Commissioner on the basis of their capacity to pay?

Subdivision 10-C Revoking registration

Subsection 10-55(1).

It is not clear what evidence would be sufficient to satisfy the Commissioner that one of the conditions listed was satisfied. Whilst the conditions listed in subsections (a), (b) and (c) would presumably have some objective evidence available, this is clearly not the case for conditions (d) and (e).

Condition (d) applies where the entity is insolvent. It is not clear how the Commissioner will decide that a registered entity is insolvent at a particular point in time. Although s459C of the *Corporations Act 2001* will be used, the Commissioner would not appear to have access to much of this information.

Condition (d) where it refers to an entity as being *likely* to become insolvent at some future time, is even more problematic. Evidentiary requirements should need to be met, as well as an assessment of the likelihood of insolvency conducted before the Commissioner can be satisfied that an entity is 'likely to become insolvent at some future time'. Perhaps if the phrase were replaced with 'likely to become insolvent within the next 12 months', it would be more justifiable.

Condition (e) provides for the deregistration of a registered entity where its continuing registration 'may cause harm to, or jeopardise, the public trust and confidence mentioned in subsection 2-5(1)'. This is an extremely broad statement and appears to hinge on the Commissioner's perception of the current level of public trust and confidence in a particular NFP entity, and then whether, in the circumstances an event has occurred which has or might undermine that level of public trust or confidence in the entity.

There appears to be no requirement for any objective evidence of such a change (or belief that such a change may occur) in public trust and confidence in the particular entity. There appears to be no requirement for the entity to always be given prior notice of the Commissioner's intention to deregister the entity, and no opportunity to present evidence rebutting the Commissioner's assertions. There is no description of which party bears the burden of the onus of proof where the deregistration process is disputed, although this would presumably be the Commissioner and it is not stated whether the criminal or civil standard of proof is intended to apply.

The basis upon which the Commissioner could be satisfied that paragraph 10-55(1)(e) has been met gives very broad powers to the Commissioner. Given that

there appears to be no 'base-line' measurement of existing public trust and confidence in a particular entity or sector more broadly, it will presumably be impossible to objectively show that the continued registration of the particular entity will harm or jeopardise such public trust and confidence. It is not clear whether the possible diminution in trust and confidence relates just to the particular entity, NFPs of the same type or subtype set out in subsection 5-10(3) or the NFP sector generally. We would also recommend removal of references to undermining public trust and confidence as a ground for deregistration of an entity.⁷

There appears to be no opportunity provided for an entity to provide additional information or rebut the assumptions inherent in a revocation decision before it is made. This is contrary to all principles of natural justice and procedural fairness normally accorded to those being subjected to serious sanctions.

10-55(4) The Commissioner's revocation of the entity's registration must include the 'specified day' for the revocation. Paragraph 10-55(4)(a)(iii) contemplates that in some circumstances the revocation of registration can take place retrospectively. Presumably where the entity had provided false or misleading information with its application for registration the revocation could be applied from the date of the original registration. Whilst this is not unreasonable in terms of the status of the entity, it could potentially have significant impacts on others. Employees of the NFP, for example, could discover that because the entity had lost taxation concessions for the previous couple of years that their personal taxation and FTB liabilities and entitlements need to be reassessed.

10-55(5) As well as providing written notice of the revocation, the Commissioner should advise under which paragraph their decision was made, the evidence relied upon or taken into account in reaching the decision and the review and appeal rights available to the entity.

10-57 (1) Appears to be redundant as the only circumstances which can occur have specific rules set out in subsection 10-57(2).

10-57(2) It is not clear what the subtle difference is between the day the entity's registration is taken to be revoked (10-55(4)) and the day the revocation takes effect. Will there be consequential changes made to the relevant tax legislation to reflect this difference? Will the entity be able to enter into Government contracts during any interim period? The example needs to spell out the differences in these concepts and their potential implications.

10-57(2)(b). This seems to encourage entities to object to revocation shortly before the 60 days are up even if they know they have no chance of success in order to extend the period until the revocation takes effect.

10-62 If this section required the Commissioner to *always* issue a 'show cause notice' prior to revoking registration, it could overcome many of the fundamental procedural fairness criticisms of this Chapter as a whole. This would also appear to more closely reflect the intention espoused in paragraphs 1.34 – 1.37 of the explanatory material.

Carers Australia strongly supports the comprehensive recommendations relating to ensuring procedural fairness provisions and practices made by the Not-for-Profit Project.⁸

Subdivision 10-D Entries on Australian Business Register

10-65 The section refers to a statement being included on the Australian Business Register that an entity is registered 'for a specified period'. Does this mean that entities will have to reapply for registration by the ACNC on a regular basis? How often?

Chapter 3 – Duties of registered entities

Part 3.1

Subdivision 55B – Annual Financial reports

55-25 It would be useful if this section referred to the definition of 'responsible individual' in subsection 210-15(1).

Subdivision 55-D – Additional Reporting requirements

55-80 Additional reporting requirements – particular registered entity

We suggest that in the written notice advising of a determination, the Commissioner also be required to specify a reasonable period for the entity to respond to the additional reporting requirement, as well as the potential ramifications of failure to provide such information. (Potentially an entity can be deregistered under 10-55 (1)(c)(i) for failure to comply with this Act). The reasonable period should be varied in accordance with the accessibility of the information sought.

55-85 Additional reporting requirements – classes of registered entities

Again, there needs to be a reasonable time provided in the legislation for affected classes of registered entities to comply with the new determination, before they can potentially have their registration revoked under 10-55(1)(c)(i).

Chapter 4

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Division 120 Investigation powers

Subdivision 120-A Investigation powers

120-10 (1) This Sub-division should presumably be restricted to registered entities.

Again, there needs to be a reasonable time provided in the legislation for an entity to comply with the Commissioner's notice, before they can potentially have their registration revoked under 10-55(1) (c)(i).

120-20 Failure to comply

It is not clear why this section is required, given the ultimate sanction of deregistration. If failure to comply with a notice is intended to only ever result in a fine, then this should be made clear in paragraph 10-55(1)(c)(i).

Subdivision 120-C Warnings

120- 200 (2) We strongly suggest that the Commissioner always be required to issue a formal warning in these circumstances. It would also be prudent for the warning to: explain the evidence which the Commissioner has considered in making the decision; why the Commissioner believes that in total this evidence has given her reasonable grounds for her belief that a contravention has occurred; and the avenues that an entity or responsible individual can use to put their own case.

Subdivision 120-460 – Power of magistrates

120- 460 Application for warrant

(3) It appears that the wording of this subsection has been transposed. It should presumably read "However, the magistrate must not issue the warrant unless the ACNC officer or some other person has given to the magistrate....."

Division 140-10 Commissioner's power to give directions

140-10 Commissioner may give directions in certain circumstances

(1)(d) appears extremely broad, and it is difficult to imagine a situation where it would be reasonable for the Commissioner to give an entity a notice under s140-15 which was not prompted by one of the other three reasons under s140-10 (1).

140-15 Kinds of direction

Again 1(d) is extremely broad and if such a direction was given it could effectively stop the NFP from operating. There should be limits on how long a direction under this part can remain in force.

140-25 Variation and revocation of directions

The time period for the reconsideration of a direction is far too long in relation to financial and other transactions.

Subdivision 140-B – General Provisions relating to directions

140-120 – Non-compliance with a direction

(1) The entity needs to be given a specified time in which to comply with a direction.

142 – 25 - Certain limits on granting injunctions not to apply

1(b) What evidence will the Court need in order to decide that 'it is likely that an entity will refuse or fail to do that act or thing'? Will the civil standard of proof be applied?

Part 4-2 Reviews and Appeals

The Taxation Administration Act 1953 provides for review by the Commissioner and then a choice of appeal to either the Administrative Appeals Tribunal or the Federal Court. Most appeals will be against actions of the Commissioner (such as refusal of registration, revocation of registration or issuing of a notice or direction) which will potentially have a significant financial impact on the NFP entity. These avenues of appeal can take an extended period to resolve issues. Given this, will the 'normal expectation' be that until the Commissioner's decision is confirmed by an appeal body, the decision is effectively 'stayed'?

Part 7-2 Common rules about penalties **Division 190 – General criminal penalties**

It is not clear why this Bill needs to have criminal penalties or sanctions above and beyond those already applying under the *Corporations Act 2001*. If criminal penalties are to apply, will the standard of proof required to prove the offence be that of 'beyond reasonable doubt'?

Chapter 8 – Interpretation

Part 8.1 Core concepts

Division 210 – Core concepts

210 - 15 Responsible individuals

(b) it would be useful if the term officer was defined.