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Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

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30 January 2012

Dear Sir,

Re: Not-for-Profit governance arrangements and Australian Charities and Not-for-Profits Commission Bill 2012

We appreciate the opportunity to comment on the Consultation Paper: Review of not-for-profit governance arrangements (the CP) and the Australian Charities and Not-for-Profits Commission Bill 2012 (the ED). We have prepared a combined response to both documents as a number of our concerns and observations are common to both.

1. General comments

We strongly support the government in its commitment to strengthening the Not-for-profit (NFP) sector, including the establishment of the Australian Charities and Not-for -profits Commission (ACNC). Given some of the concerns that we have with the CP and the Bill we consider the implementation date of 1 July 2012 to be very ambitious. We have concerns as to whether or not it will allow for full consideration of all the relevant issues.

1.1 ACNC Scope

We support the approach by Treasury, as set out in the factsheets to the ED, that the regulatory reform of the sector should be implemented in stages, commencing with all registered charities coming under the remit of ACNC from 1 July 2012. We are concerned however that the ED requires all NFP entities to be registered with the ACNC and does not appear to refer to a staged approach to reform. We recommend that the ED specifically make reference to the proposed staged approach as discussed in the factsheets.

Furthermore the CP specifically states that the outcome of that review will feed into the legislation establishing the ACNC and any legislation relating to issues of governance requirements for NFPs will be in place in time for the commencement of the ACNC on 1 July 2012. It is unclear whether any such governance requirements will be enforced on the broader NFP sector by the ACNC from 1 July 2012. If the ACNC's regulatory authority is to be limited to registered charities from 1 July 2012, then we would not expect new governance requirements to be enforceable on other NFP entities until such time as the ACNC is given regulatory authority over entities other than registered charities.

1.2 Interrelation/Communication with other Regulators

It is unclear to what extent Treasury is communicating and consulting with other regulatory bodies in relation to parallel reform agendas. Decisions made in legislating the powers of the ACNC and reporting obligations of the NFP sector could adversely impact NFP entities if such decisions are not made in full consultation with other regulatory bodies (e.g. the ATO particularly considering its ongoing tax reform agenda and the AASB with its Performance Reporting review for NFPs). Clarity is required to explain how the ACNC is coordinating with the appropriate regulatory bodies in this regard and in some cases how the four consultation papers released to date interrelate with each other.

It is also unclear how the current additional reporting requirements of various government departments (e.g. to have grant funding acquitted or a prudential audit) will be impacted by the proposed legislation.

1.3 Timing of consultations

Given the diversity of existing arrangements within the NFP sector, parallel reform agendas, potential legislative conflicts and the far reaching nature of the reforms we believe that there has been an inadequate amount of time allowed for sector consultation. We would suggest that 1 July 2012 may be too soon to have in place legislation relating to duties and responsibilities of the NFP sector and that more time should be allowed for further debate and review of complete draft legislation.

2. Comments on the ED

2.1 Reporting

We agree with the principle of a tiered approach to reporting (e.g. small, medium, large) but there needs to be greater clarity as to how these definitions interrelate with existing Corporations Act reporting requirements for companies limited by guarantee and other regulatory reporting obligations (e.g. general purpose financial reports are required by all aged care providers regardless of size). The reporting obligations should not be any more onerous than existing obligations and where possible should align with Reduced Disclosure Regime reporting. The criteria for such thresholds should be subject to further consultation with the sector.

The thresholds proposed for mandatory financial reporting in accordance with the Australian Accounting Standards appear low. Furthermore there appears to be no scope in the ED for entities to apply the reporting entity concept which would provide non reporting entities with the ability in certain circumstances to prepare Special Purpose Financial Statements.

We do not support the mandatory financial reporting in accordance with Australian Accounting Standards for small DGR entities.

2.2 Information Statements

The ED paragraph 55-5 (1) states “a registered entity must give a statement (an *information statement*) for a financial year to the Commissioner in the approved form”. The ED does not address the content and form of such statements for small entities. This requirement is likely to result in an additional reporting obligation for many small NFPs and as such we strongly recommend that the content of such a report should be subject to further sector consultation before finalisation.

2.3 Subdivision 55-E - Substituted accounting periods

We note that in accordance with this subdivision the Commissioner will have the authority to approve a registered entity to adopt an accounting period “which is a period of 12 months ending on a day other than 30 June”. Many NFPs currently have a financial year end which is not 30 June. In some cases they are required to adopt a particular year end by another regulator, for example, the Department of Education, Employment and Workplace Relations (“DEEWR”) require all non-government schools to have a 31 December financial year. We question why these entities should be required to apply to continue with such an arrangement.

2.4 Period for lodgement of annual financial report

In the event that the ACNC does not grant alternative accounting periods it may be impractical for all registered entities to report to the ACNC by 31 October following the financial year end. In addition we recommend a more practical timeframe be considered for certain types of NFP entities especially those who will have to comply with all the accounting standards for the first time.

2.5 Audit/Review Requirements

Paragraphs 55-40 (1) and (2) acknowledge that both audits and reviews of registered entities can be conducted. However, there is confusion as to whether all of the subsections deal with the auditors obligations when conducting both an audit or review. For example, paragraph 55-40 (3) states “The auditor must form an opinion about” with subsection 55-40 (3)(b) referring to “assistance necessary for the conduct of the audit or review”. In a review engagement an auditor does not form an opinion; rather the auditor forms a conclusion. We suggest therefore that paragraph 55-40 (3) should be redrafted to state “The auditor must form a conclusion about”.

We also suggest that the section heading be amended to state Audit and Review.

Section 55-45 states that “the auditor must conduct the audit or review in accordance with auditing standards” we note that the standard applicable to review engagements is called ASRE 2400 “Review of a Financial Report Performed by an Assurance Practitioner who is Not the Auditor of the Entity”.

Par 55-50 should be titled “audit and review working papers” .

Par 55-55 refers to the “Auditor’s independence declaration” it may be worthwhile clarifying that this is applicable to both audit and review engagements.

Paragraph 55-60 deals with the auditor’s report on the annual financial report but there does not appear to be any guidance in the ED on the requirements for the review report. We recommend that the content of it should be similar to that in respect of an audit with the major difference being the form of conclusion.

We do not agree with the requirement set out in paragraph 55-60(4)(a) for the audit report to describe “any defect or irregularity in the financial report”. During the conduct of an audit, or a review, the auditor applies the concept of materiality in forming the conclusion, which in the case of the audit is an opinion, on the financial report. It is not uncommon for the financial report to contain some immaterial errors or disclosure deficiencies which the auditor judges, in the aggregate, to be immaterial and therefore does not modify the report. We note that the Corporations Act does not contain a similar requirement and we believe that the audit and review requirements should be consistent with those set out in the Corporations Act.

Section 55-60 (4)(b) states “the auditor’s report must describe “any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 55-40(2)(b), (c) or (d). Section 55-40(2) does not have any subsections accordingly, it is unclear to us whether this section was intended to refer to 55-40 (3) or some other section of the Act. Consistent with our comment on the requirement in section 55-60(4) (a), in the preceding paragraph, we do not believe that it is appropriate for matters of this nature to be included in the audit report.

We cannot provide detailed feedback in relation to the appropriateness of Section 55-40(3)(d), which requires the auditor to form an opinion on “whether the registered entity has kept other records” until the legislation relating to these other records has been drafted and reviewed. We are of the opinion that the auditor’s obligations in this regard should be similar to those in the Corporations Act, that is, to review the statutory records.

Whilst the ED provides guidance on the audit and review of the financial report it does not address the appointment, removal and resignation of auditors.

2.6 Record retention inconsistencies

The ED and explanatory materials contain inconsistencies in respect of the requirements in relation to retention of records.

Paragraph 50-5 (4) requires registered entities to retain the financial records for 5 years

Paragraph 55-50 requires audit working papers to be retained for 7 years

Paragraph 55-80 (6) outlines the additional reporting requirements for which a request is limited for past periods of no later than 6 years.

These inconsistencies will result in unnecessary confusion and could result in inadvertent breaches. For example, an entity could receive a request for information under paragraph 55-80(6) for a period which exceeds the period for which the entities must retain financial records under paragraph 50-5 (4). The requirements should be consistent with that in the Corporations Act which requires financial records and audit working papers to be retained for 7 years.

3. Comments on the CP

3.1 Responsible Individuals definition

The ED and CP refer to the concept of ‘responsible individuals’. In order to avoid confusion we recommend that the existing legislated terms and definitions for people in positions of responsibility are used in the ACNC legislation. For example, the Corporations Act defines Directors and Officers.

3.2 Duty of Care

In our opinion the level of duty of care required of “responsible individuals” should be the same across all NFP entities. It is the responsibility of the governing body to deliver the mission of the organisation regardless of the entity’s size and the extent of public money received. The actions required to discharge those duties of care will differ between organisations (partly based on size) but the standards of care must remain the same for all entities. Such standards must be maintained whether the “responsible individual” is paid, volunteering, formally qualified or otherwise.

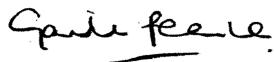
3.3 Principles based Governance Requirements

We agree there should be minimum governance standards throughout the sector however these standards should be based on governance principles rather than governance rules that are legislated. We caution however that some of the questions in the Governance consultation paper are quite prescriptive which appears to be contrary to the general stated objective of applying a principles based approach.

We also note that many NFP entities are already subject to governance requirements that are set out in their Constitution, Deed or other governing documentation. We believe a principles based governance framework, similar to the ASX type requirements for listed entities, tailored to the needs of the NFP sector would be beneficial to the sector and the public.

We would be pleased to discuss our comments with either yourself or other members of your team. If you wish to do so, please do not hesitate to contact me on (02) 9322 7158.

Yours sincerely,



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