



Foundation for Alcohol Research & Education

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To whom it may concern

SUBMISSION TO THE REVIEW OF AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION (ACNC) LEGISLATION

The Foundation for Alcohol Research and Education (FARE) welcomes the opportunity to provide a submission on the *Review of Australian Charities and Not-for-profits Commission (ACNC) legislation*.

FARE is an independent organisation that has been working for more than a decade with communities, governments, health professionals and police across the country to take action to reduce alcohol harm. In that time, FARE has helped more than 750 communities and organisations, and backed over 1,400 projects around Australia. Alcohol harm is significant, resulting in more than 5,500 lives lost and 157,000 hospitalisations each year in Australia.¹

FARE is a health promotion charity registered with the ACNC and has DGR status. As outlined in FARE's constitution, the objects of the Foundation are to:

- a) Promote health and social wellbeing by stopping harm caused by alcohol in Australia, including alcohol-caused disease and injury, and alcohol's harm to others.
- b) Support evidence-based alcohol-related public health policy, including prevention, treatment and rehabilitation.
- c) Promote the prevention of alcohol harm, particularly among vulnerable population groups such as children, young people, women and Aboriginal and Torres Strait Islander peoples.
- d) Promote community awareness and provide education about the harmful effects of alcohol consumption and its impact on chronic disease.
- e) Identify, commission, conduct and disseminate research that will lead to a better understanding of what works to stop harm caused by alcohol.

As the above highlights, FARE's purpose and associated activities are diverse. FARE's Strategic Plan 2017-22 outlines our five strategic goals. These goals aim to lead change by working with individuals, communities and organisations across the country, develop and advocate for policies and programs that will reduce alcohol harm, communicate world-leading research and continue to defend the public interest and hold the alcohol industry to account.

To achieve these goals FARE activities range from developing and undertaking targeted health promotion campaigns and commissioning research, to research translation and advocacy directed at all levels of government. Advocacy is a fundamental component of FARE's mission to stop harm from alcohol given such a pursuit is highly dependent on policy change.

Any reform of the ACNC legislation should be guided by principles that ensure a sustainable NFP sector. FARE has developed four principles to guide the review of ACNC legislation. These are:

1. A continued focus on charitable purpose (or purposes) that is of public benefit.
2. Advocacy in pursuit of a charitable purpose is seen as a legitimate activity.
3. Governance and administration processes should be clear and efficient.
4. Governance and administration must be beyond political interference.

FARE's positions and comments on the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation are informed by these principles. FARE also supports the recommendations made by the Community Council for Australia's submission.

1. A continued focus on charitable purpose (or purposes) that is of public benefit

One of the great strengths of the ACNC has been the strong support it has enjoyed from the sector during its establishment phase. This is partly a consequence of the extensive engagement of many, including the charities sector, in framing the following three objects of the ACNC:

- a) to maintain, protect, and enhance public trust and confidence in the Australian not-for-profit sector;*
- b) to support and sustain a robust, vibrant, independent, and innovative Australian not-for-profit sector; and*
- c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.*

These objects clearly align with the requirements that a charity must focus on 'purpose' to be classified as a charity. Purposes, as stated in an organisation's formal documents, such as its constitution, are the starting point for inquiries as to whether it is charitable. Activities deemed a second tier inquiry are used as indicators or signposts of an organisation's purpose. This has been accepted by the ACNC legislation where the principal charity registration sectionⁱⁱ is expressed in terms of purpose with one exception.¹

A purposes approach allows those with oversight of charities to devote charitable resources to the most efficient and effective way of achieving their mission. This allows flexibility that a pure activities approach might not allow.

¹ The one exception is Harm Prevention Charities which have a principal purpose test.

Given the breadth of these objects, the success of the ACNC to date, and the extensive process undertaken to develop the objects in the first place, there is no reason to change the ACNC objects in any way. FARE supports maintaining the current objects of the ACNC legislation.

2. Advocacy in pursuit of a charitable purpose is seen as a legitimate activity

Advocacy by charities has been recognised as a legitimate activity essential to Australia's system of parliamentary democracy. Australian charities can undertake advocacy to further their charitable purposes, through supporting or opposing relevant government policies and decisions. The importance of this was recognised by the High Court in the *Aid/Watch*ⁱⁱⁱ decision of 2010, where the Court held that charities undertaking advocacy was essential to Australia's constitutional system of parliamentary democracy. This decision was subsequently legislated in the *Charities Act 2013*.

Advocacy is an important approach that charities can use to address the causes of health, social and environmental problems, rather than just the symptoms. This often requires policy change.

For example, if a community is experiencing high levels of alcohol harm due to poor regulation of licensed premises in that area, providing more police and hospital emergency staff will have little impact if licensed premises can continue operating in the same way. Achieving a reduction in alcohol harm is accomplished when policies are implemented, often resulting from advocacy efforts of organisations. These advocacy activities are aimed to improve the health and safety of communities who are negatively impacted by alcohol.

Advocacy activities by charities also play a crucial role during elections. Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable. Under current charity law it is clear that charities must comply with the following principles:

- charities cannot donate to any political party or candidate
- charities cannot produce how to vote cards
- charities cannot stand candidates in elections
- charities cannot advocate publicly on any issue that is not part of their charitable purpose.

No restrictions currently apply to businesses and industry groups in promoting their vested interests during election periods such as the activities of the Winemakers Federation of Australia, the Brewers Association of Australia, the Minerals Council of Australia and the Pharmacy Guild of Australia. This is despite these industry groups having clear vested interests in governments' policy agendas.

FARE does not support any further involvement of the ACNC to restrict the advocacy activities of charities.

3. Governance and administration processes should be clear and efficient.

The compliance cost of the duplication and inconsequential administrative burden associated with fundraising regulations in Australia is unacceptably high.

There is legal contention about the extent to which current Australian Consumer Law (ACL) applies to the activities of charities, particularly in relation to fundraising.

The current ACL only partly applies consumer protection issues in relation to fundraising in particular. Where NFPs are providing goods and services there is clearly a consumer and a provider that can be subject to consumer law. Where no exchange of goods takes place, but donations are made, there is less clarity around whether the donor is a consumer, and if so, what goods or services are being provided.

The engagement of community members with a local charity could only rarely be described as a commercial trade, or the provision of services in a competitive marketplace. There are, however, some principles that transcend the exact nature of the interaction and go to the values and principles informing organisational engagement with the community.

Any organisation involved in misleading or deceptive conduct should be subject to consumer law. This includes all charity and not-for-profit organisations.

The appropriate application of consumer law can only increase public trust and confidence in the NFP sector and help support the vast majority of organisations that operate ethically and transparently in all their dealings with consumers and the broader community. Charities deal in trust and are committed to maintaining and building public trust and confidence.

The real benefit of applying the ACL to not-for-profits is that it is relatively modern legislation (as opposed to the absurdly outdated fundraising regulations) and is currently administered by the same authorities that administer fundraising regulations. ACL also at least partially applies to the activities of charities already.

While supporting the application of ACL to charities there may be unintended consequences if all the provisions of consumer law are applied in a catch-all way across the whole charities sector. There may also be some technical issues in relation to a range of provisions including how donations and gifts are treated, etc. that may require further amendments to the ACL.

For this reason, FARE supports a staged application of ACL to the charities sector. This must involve consultation with the charities sector itself, the ACNC, and the various regulatory bodies at all levels of government.

4. Governance and administration must be beyond political interference.

Political interference and increased bureaucracy will not contribute to supporting a sector that has for decades worked to achieve positive social, cultural and environmental change. The current process for appointment (or re-appointment) of the ACNC Commissioner needs to be reformed to ensure there is more independence and transparency.

In the United Kingdom, potential candidates to be head of major statutory bodies are asked to appear before Parliamentary Committees prior to finalisation of any appointment. This process could be adopted in Australia for critical appointments like the ACNC Commissioner.

FARE supports a merit based transparent appointment process, as it is essential in maintaining public and charity trust in the ACNC.

Conclusion

FARE and others in the NFP sector undertake activities with a clear mission. Any reform to the ACNC legislation must be done in a way that will result in the growth and sustainability of the NFP sector.

Please do not hesitate to contact me on 02 6122 8600 or michael.thorn@fare.org.au if you would like further information about this submission.

Yours sincerely



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ⁱ Gao, C., Ogeil, R.P., & Lloyd, B. (2014). *Alcohol's burden of disease in Australia*. Canberra: FARE and VicHealth in collaboration with Turning Point.

ⁱⁱ S 25-5 *Australian Charities and Not-for-profits Commission Act 2012*. Retrieved from http://www.austlii.edu.au/au/legis/cth/num_act/acanca2012523/

ⁱⁱⁱ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42. Retrieved from <http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html>