



National Disability Services

NDS Submission

# Exposure Draft, Australian Charities and Not-for-profits Commission Bill 2012





National Disability Services

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### **About National Disability Services**

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes around 700 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

NDS welcomes the opportunity to comment on the Exposure Draft of the legislation to establish the Australian Charities and Not-for-profit Commission (ACNC) but is disappointed at the timing and the brevity of the consultation period. We are conscious of the tight timeline if the Government is to honour its commitment to establish the ACNC by 1 July, but requiring feedback on the Exposure Draft during late December and January restricts input from the organisations that will be affected by this legislation.

The statement that further broad consultation with the not-for-profit sector will not occur before the introduction of the Bill into Parliament (it is to be restricted to a 'targeted confidential consultation' only) is also disappointing. Important information on transitional provisions, reviews and appeals and the governance requirements of registered charities is absent from the Exposure Draft. The not-for-profit sector should be provided with an opportunity to respond to a revised draft of the Bill prior to it being introduced into Parliament.

NDS largely supports the Bill. The intention to establish a 'one-stop-shop' for the sector is desirable, as is the commitment to reduce the regulatory burden on not-for-profit organisations. The staged approach to regulation, beginning with charities, is appropriate, but care must be given to avoiding duplication of reporting requirements on organisations during the transition process. For this reason, the proposed automatic transfer of endorsements from the Australian Taxation Office (ATO) and acceptance of them by the ACNC is sensible. The long-term objective of having the ACNC as the national one-stop-shop for not-for-profit regulation, which requires the cooperation of state and territory governments, is desirable.

## Specific comments

### Object

The Object of the Bill is "to promote public trust and confidence in not-for-profit entities that provide public benefits". The provision of education and information will be a key means of achieving this Object. Indeed, one of the Fact Sheets on the Exposure Draft states that "providing education and support will be the largest function of the ACNC". The Bill does not adequately reflect the large educative role of the ACNC, focussing more on its compliance and control functions. The Bill should amplify the ACNC's educative role in relation to NFP entities directly and to the wider community.

The legislation to establish the ACNC (either the Act or the anticipated Regulations) should set out principles of regulation to guide the Commission, based on a risk management approach. The principles should expand on the Bill's tiered approach to annual financial reporting based on the size of an entity. The principles would require the least reporting obligations where the risk to public funds is low. Such an approach could take account not only of the quantum of funds entailed, but also an organisation's record of compliance and its governance policies, internal systems and other accountabilities which it meets (eg Quality Assurance accreditation).

## Function

The Bill specifies the ACNC's function in registering not-for-profit entities that provide public benefits, but (to clarify the effect of registration) should add that the ACNC will *determine* the charitable status of not-for-profit entities.

Supporting documentation for the Bill (such as the fact sheets and newsletters) states that during the transition period the ACNC will accept the ATO's current determination of the charitable status of organisations. This is not stated in the Bill but should be added (perhaps in the section on transitional provisions which are not yet available).

## Registration

According to the Bill, an entity provides grounds for revoking its registration if it is 'causing harm to, or jeopardising, public trust and confidence' (10-55(1)(e) p.16; 4-1(2)(b) p.9; & 143-125 p.158). These grounds are too broad and fail to inform not-for-profit entities as to what actions or omissions would trigger deregistration. NDS is also concerned that registration can be revoked by the 'failure to comply with the Bill or regulations or a direction'. This broad statement could see inadvertent omissions or minor breaches used as grounds for deregistration.

Undermining 'public trust and confidence' should be elaborated with reference to more explicit reasons for deregistration such as 'misconduct' (links to 10-55(1)(e) p.16)

NDS is pleased to note that registration will entail no fee.

## Registry

NDS questions the value of the registry including the qualifications of each 'responsible individual'. The boards and committees of not-for-profit entities comprise voluntary community members. In the disability sector some could be local business owners, people with disability, parents of children with disability or community leaders with extensive involvement with voluntary associations. Listing qualifications will not adequately capture the valuable skills and experience these people could bring to a board. Boards and committees should ensure that they have an adequate range, mix and depth of skills, but qualifications alone will not provide a meaningful skills profile.

The definition of a 'responsible individual' (210-15 pp 96-97) is unclear as to the meaning of 'officer'. The Corporations Act includes directors in its definition of 'officer'; the ACNC Bill treats them as distinct ('a director or officer'). For clarity, the definition in the Bill should be aligned with the definition in the Corporations Act.

## Power to give directions

The Commissioner's power to give directions to not-for-profit entities is prescribed too broadly. In particular, NDS does not support the inclusion of "the direction is necessary to advance the purpose for which the entity is registered". This should be re-drafted so it is more closely aligned to the Commissioner's role (e.g. to ensure the property of the entity is being directed to the purposes for which the entity is registered).

The Bill gives the Commissioner power to direct the entity if the Commissioner believes that the "registered entity is conducting its affairs in an improper or financially unsound way" (140-10 (b) p, 48). This should be tightened to avoid the situation where the Commissioner is second guessing other sources of recognised financial expertise on the question of an organisation's financial strategy or level of financial risk.

## Reporting obligations

The section on record-keeping is vague, which limits its usefulness. As stated, a registered entity must keep financial records that "correctly record and explain its transactions and financial position and performance" and "would enable true and fair financial statements to be prepared and audited or reviewed". It must also keep records that "correctly record and explain its operations and acts" and "would enable the Commissioner to assess properly the entity's entitlement to be, or remain, registered". NDS recommends this section to be re-drafted to be more specific about the requirements.

Given the ongoing involvement by state and territories in the regulation of not-for-profit entities (hopefully for a limited period of time but dependent upon negotiations) NDS requests that a provision to enable the ACNC to accept the reports provided by incorporated associations under the relevant state or territory legislation be included. This would reduce the regulatory burden on entities.

## Transitional provisions

The absence of transitional provisions from the Exposure Draft is disappointing as they will influence how smoothly (or not) the transition process is for charities and whether or not the compliance burden for entities is not increased. NDS requests that careful consideration be given to the drafting of these provisions as they will impact on the acceptance of the ACNC by the sector.

As stated above, NDS's view is that the not-for-profit sector should be provided with an opportunity to comment on these provisions prior to their introduction into Parliament.

Prior to 1 July 2012, the start date for the ACNC, information about its functions and requirements needs to be well communicated to the not-for-profit sector (and specifically to charities). NDS recommends that relevant peak bodies be funded to undertake this educative task with their members.



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