pilchconnect

a specialist legal service
for community organisations

27 January 2012

Mr C Leggett
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The Treasury
Langton Crescent
PARKES ACT 2600

By email: NFPReform@treasury.gov.au

Dear Mr Leggett,

Exposure Draft, Australian Charities and Not-for-profit Commissions Bill 2012

PilchConnect is pleased to have the opportunity to comment on the Exposure Draft, *Australian Charities and Not-for-profits Commission Bill* 2012 (the **Bill**) which establishes the Australian Charities and Not-for-profits Commission (**ACNC**). The extension on the submission date was appreciated. Information about PilchConnect is contained at Appendix A.

In our previous submissions we have advocated for the establishment of an independent, one-stop-shop, specialist regulator and its successful implementation remains a priority in our 'Smarter Regulation for Community Organisations' campaign. With a proportionate and constructive regulatory approach we believe this regulator will provide critical underpinning to support the vital contribution the not-for-profit (**NFP**) sector makes to Australian civil society. This underpinning supports public (and government) trust and confidence in the sector which, in turn, helps charities and other NFPs achieve their mission.

Overall Comments

In light of our broad support for the Commonwealth Government's commitment to establish the ACNC, we seek amendments to the Bill which we believe will better achieve the creation of a regulator that:

- is independent to the fullest extent possible given that Government has decided that the ACNC is to be a statutory body within the Australian Taxation Office rather than a separately constituted body;
- has a clearly defined current ambit;
- has a clear hierarchy of objects that are, at the highest level, directed to supporting charities (and other NFPs) to achieve their mission;
- has a clearer range of functions to support these objects particularly in relation to education and advice;
- can share and receive information with and from other regulators where it is appropriate (for example, to avoid regulatory duplication, for serious breaches, or to prevent criminal activity);

- has broad and strong powers that can be used to deal with serious breaches but with well articulated legislative safeguards and guiding principles to help ensure its powers and its imposition of penalties / other sanctions are in line with
    - a proportionate and risk based regulatory approach, and
    - balance the need to be able to act swiftly with procedural fairness;
- does not have a role which interferes with the autonomy that properly rests with the governing body of the charity (or other NFP) (this issue is elaborated on further in our submission in response to The Treasury consultation paper on governance);
- has sufficient discretionary powers to achieve the best possible balance between minimising unintended or disproportionate consequences and the need for certainty; and
- is established by legislation that is not readily open to attack on constitutional grounds.

We highlight below some provisions that are of particular concern to us in light of the client base we prioritise, namely, small volunteer-run NFPs.

Transitional provisions

We note that several important sections are not included in this Exposure Draft and will not be available publicly before the Bill is introduced into Parliament – namely, the transitional arrangements, governance provisions, reviews and appeals and consequential amendments. We hope that these provisions will be drafted in a manner which is consistent with the overall approach described above. In particular, the transitional provisions should:

- give the ACNC sufficient time to 'open its doors', establish links and credibility with the NFP sector, the public and all Australian governments before additional roles (for example, enforcing new governance standards) are added; and
- existing charities (many of which are small), should not be proactively required to take any steps as at 1 July 2012 beyond confirming contact details and that they are still operating.

Structure of this submission

Throughout this submission, we cross reference many of the observations and recommendations made in the detailed submission prepared by the University of Melbourne Law School's Not-for-Profit Project (**Melbourne University submission**). We have highlighted what we regard as the most critical points in the Melbourne University submission with emphasis on concerns relevant to small charities (and other NFPs).

We endorse Melbourne University's submission.

In the course of preparing our submission we have provided feedback to Melbourne University and collaborated with several NFP peak bodies (and we cross reference some of their submissions). Unfortunately the very tight deadline combined with the time of year has meant we have not been able to consult more broadly within the sector, or to seek formal endorsements of our submission from NFPs that we work with. Despite being keenly interested in the issues, most small NFPs do not have the legal / policy expertise or resources to respond, especially to a submission-based consultation process.

We have included two hypothetical case studies grounded in the types of issues we see in our case work. For ease of reference we have used the same headings as in the Melbourne University submission which cover points in chronological order as they appear in the Bill.

Detailed Comments

1. Clarifying the Scope of the Bill

We are concerned about:

- the need for clarity about which groups are covered by the Bill;
- constitutional law issues;
- the need for information sharing between the ACNC and other regulators; and
- the need for the ACNC to be able to group related small entities.

We refer to and endorse recommendations 1 - 6 of the Melbourne University submission.

Which groups are covered?

The Bill does not meet the threshold requirement of clearly specifying the classes of entities it applies to. A clarifying statement needs to be inserted stating that the Bill applies 'upon commencement, to all entities claiming charitable status for the purpose of obtaining Commonwealth tax concessions'.[1]

Additional provisions can provide that the Bill will apply to other classes of NFPs (presumably NFPs 'that provide public benefits' as referred to in clause 2-5) at such later date and in such phased order as is specified by regulation. However, other classes of NFP should not be bought within the ambit of the ACNC without:

- a proper cost-benefit analysis of such groups being required to register with, and report to, the ACNC;[2]
- further consultation with the NFP sector in accordance with the principles in the National Compact between the Commonwealth Government and the NFP sector;[3]
- further consultation with the States and Territories about centralising reporting and, possibly, enforcement; and
- the ACNC being sufficiently established as a regulator and receiving the necessary additional resources to undertake any expanded role.

1 'Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012', The Not-for-Profit Project, University of Melbourne Law School, 21 January 2012, page 7.

2 The consistently repeated Federal Government commitment to reducing red tape must be effectively delivered. Affirmed in - Media Release, The Hon. Bill Shorten MP & The Hon Tanya Plibersek MP, 'Making it easier for charities to help those who need it', May 2011 & Treasury's Not-for-Profit Reform Newsletter, Issue 3, 23 December 2011.

3 See http://www.nationalcompact.gov.au/

Further, the reference in clause 2-5 to NFPs 'that provide public benefits' is itself confusing. Is it intended to exclude NFPs that are solely member-serving (for example, an organisation that provides mutual support for those affected by a particular illness)? The distinction between public-serving and member-serving NFPs is not clear cut with many examples that are a hybrid.[4] Often a member-serving group can also 'provide public benefits'.[5] There is also a 'public benefit' provided by the overarching benefit of facilitating freedom of association and promoting a healthy civil society. The general statement in clause 2-5 could remain if there was a more specific provision outlining how the coverage of the Bill may be expanded over time to other NFPs seeking Commonwealth taxation concessions (that is, other than charities).

We reiterate the recommendation made in our submission to *'Restating the 'in Australia' Conditions'* consultation paper[6] that the definition of 'not-for-profit' should be set out in full in the Bill (or the legislation containing the new statutory definition of charity), rather than in the *Income Taxation Assessment Act 1997* (Cth) and merely cross-referenced in the Bill.

Constitutional law issues

We agree with the constitutional law concerns identified in the Melbourne University submission.[7] These constitutional law concerns will, if not remedied, make the final Act more vulnerable to legal challenge. Needless to say facing an (avoidable) high court legal challenge soon after it is established would be incredibly destabilising for the ACNC and the sector. Tighter drafting (and possibly not trying to cover off all future roles that may be given to the ACNC) could save the inordinate amounts of time and money involved in defending such a legal challenge, let alone the broader ramifications if the challenge were successful.

The main basis for the constitutional law concerns relate to the multiple references to 'Australian law' which is defined as being Commonwealth, State and Territory laws. The Bill includes powers which are directed to ensuring the ACNC can enforce compliance with any 'Australian law that relates to the object of this Act' (for example, clause 140-15 empowers the ACNC Commissioner to direct an entity to comply with any such Australian law). In addition to creating constitutional uncertainty, this approach is not workable because:

- it creates uncertainty as to which Australian laws it refers to as the 'object of the Act' is very broad (that is, 'to promote public trust and confidence in the not-for-profit entities that provide public benefits'); and
- it could result in duplication of regulatory effort and an entity being investigated and even penalised more than once for the same matter (for example, ACNC issuing formal warning for the same, possibly minor or inadvertent infringement, as well as investigations and/or penalties by the relevant State or Territory-based regulator).

The following case study highlights this point.

[4] See Lyons, M 'The Contribution of the non-profit and cooperative enterprises in Australia, Third Sector', Chap 1, Allen & Unwin 2001.
[5] For example, a group that provides mutual support for those affected by illness provides 'public benefits' by reducing the burden on the health system because, with the mutual support of others in the group, the members have improved health outcomes.
[6] See, http://www.pilch.org.au/submissions/#2
[7] 'Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012', The Not-for-Profit Project, University of Melbourne Law School, 21 January 2012, pages 8-11.

Case study

Young People in Need (a registered ACNC charity) runs a family picnic day to raise funds for its food parcel program. It was organised 'on the smell of an oily rag' and at very short notice, largely because they received a considerable quantity of donated food that was not suitable for their parcels. Some of the unpackaged food was cooked and served at the picnic. With the help of social media it turned into a big event with over 30 volunteers and 200 people gathering in a park on a beautiful sunny day. In the short lead up time, they had not notified or registered their event with the local council, no records of the food handling procedures were kept, nor was a food safety program adopted as required under the *Food Act (Vic)* 1984 (see PilchConnect, http://www.pilch.org.au/events_food/). However, very high standards of hygiene were followed, considerable funds were raised and the day passed without event.

While the ACNC Commissioner may not choose to use their powers in this way, based on current wording in the Bill, it seems that:

- Young People in Need could be 'investigated' (clause 120-100) or given a 'formal warning' (clause 120- 200) by the ACNC Commissioner because they failed to comply with a State-based law which would be a relevant 'Australian law' because:
  - food safety is relevant to running a charitable fundraising event,
  - running safe / legally compliant charitable fundraising events concerns 'the management of a registered entity' (clause 120-100(1)(b)(i)), and
  - is important to 'public trust and confidence' (the object of the Bill in clause 2-5); and
- Young People in Need could receive both
  - a formal warning (clause 120-200) which will appear on the ACNC register when anyone (for example, a possible funder) searches it, and
  - sanctions from a local council or the Department of Health who administer the *Food Act*.

Multiple investigations will have resource implications for Young People in Need and for all three government bodies.

The better approach is to ensure that information about serious, repeated and/or continuing breaches of any 'Australian law that relates to the object of this Act' is shared between the ACNC and relevant Commonwealth, State and Territory-based regulators and even overseas regulators (see further comments under heading 8, Information Sharing, below).

Grouping of related small entities

We endorse the need for the ACNC Commissioner to have the ability to treat related entities as a single entity to avoid an unnecessary burden on a large number of very small entities because of the range of ways charities (and other NFPs) are structured. Often there are historical or canon law reasons for these

structures. As long as overall transparency is achieved, the ACNC should be able to exercise discretion to ensure any additional burden is minimised.

2. Re-balancing the emphasis of the Bill

We believe the Bill needs to be re-drafted to:

- set the right tone, particularly in relation to the serious regulatory powers held by the Commissioner;
- specify a hierarchy of objects of the Act;
- state the regulatory principles;
- improve the description of the Commissioner's functions (for example, to include the express function of determining NFP, charitable status and Public Benevolent Status); and
- express the independence of the Commissioner.

We refer to and endorse recommendations 7 - 10 of the Melbourne University submission. In relation to recommendation 9(c) we clarify that such educative functions should not duplicate, but rather support and collaborate with sector-based services (a point also made in other Melbourne University submissions and the 2010 Productivity Commission Report on the Contribution of the Not-for-Profit Sector).

Legislative tone

We strongly endorse the comments in the Melbourne University submission that:

> The tone of the Bill as set out in these clauses, while not perhaps of great legal significance, is of significant symbolic importance to the sector. Setting the right tone communicates to the sector the Government's objectives in its ambitious agenda for NFP reform. Further, the tone of the Bill is likely to influence the approach taken by the regulator to its role. Finally, striking the right balance in the Bill will help to counteract the impression, acknowledged in the Fact Sheets, that the Bill emphasises compliance and enforcement. [8]

As clear evidence of this point we refer to the submission made to this consultation (and the governance consultation) by the Australian Council of Social Service (**ACOSS**):

> The widely recognised social and economic value of the sector, and the role of the regulator as a mechanism for supporting the sector's contribution further, are noticeably absent in the tenor of the legislation as drafted. The Objects section illustrates this best, containing a tension between 'promoting' public trust and confidence in the sector; supporting the sector by redressing overly burdensome and ineffective regulation; and establishing a satellite institution to support ATO and Treasury efforts to constrain tax concessions in the interests of revenue. There is the strong potential for disharmony between these purposes, and we question the merit in presenting them as equal priorities.[9]

The tone and emphasis of the Bill needs to be re-balanced so it refers to compliance, governance and accountability but in the context of proportionality and reasonableness. The Bill needs to reflect the public announcements about the ACNC being a supportive and educative (or a 'light touch') regulator, albeit with

[8] 'Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012', The Not-for-Profit Project, University of Melbourne Law School, 21 January 2012, page 15.

[9] Australian Council of Social Service, 'Response to the Treasury Australian Charities and Not-for-Profit Commission Exposure Draft and Governance Arrangements Consultation Paper', January 2012, page 9.

strong and broad enforcement tools that it will use on a proportionate basis and allowing for 'self correction'.[10] This need to re-balance the Bill is also referred to in ACOSS's submission.[11]

This 'tone' should be reflected in the 'Objects' (clause 2-5), 'Functions' (clauses 2-10), the 'Guide to the Bill' (clause 3-5), and in the Guide material for each Division (including those which have not been released in the Exposure Draft of the Bill).

Objects

We endorse the Melbourne University recommendations in relation to the objects of the ACNC. We support the recommendation that its ultimate goal should be to facilitate the sector to fulfil their diverse goals (which creates a better civil society and more connected communities), supported by second and third tier goals (which support public trust and confidence in the sector through having better run NFPs and reducing the compliance burden).

Supporting the promotion of public trust and confidence should be an object of the Bill, however it should not be the ultimate priority of the regulator. Rather, it is a 'means' to the broader 'end' of NFPs fulfilling their diverse goals. We agree with the ACOSS submission that the focus throughout the Bill on public trust and confidence has created concern that the government has an underlying 'suspicion' about the sector and whether it can be 'trusted'.[12] Having 'promoting' public confidence as the primary object unnecessarily fuels this suspicion. Changing the wording to 'supporting' (compared with 'promoting') could help allay sector concerns; it would be a subtle but important difference in emphasis. It would position the ACNC as a primarily 'facilitative' rather than 'punitive' regulator.

The third tier objectives of transparency and accountability should extend beyond those stakeholders currently included in the Bill to beneficiaries (clients), members, volunteers and other stakeholders. The primary focus of an NFP entity is to serve the welfare of its beneficiaries or its members, rather than its funders, and this should be reflected in the legislation.[13]

Other (third-tier) goals which we support being included in the Act are:

- the streamlining of requirements, including reporting, so as to minimise compliance costs and provide consistency for NFPs;
- promoting compliance with legal obligations; and
- preventing abuse, self-dealing and serious mismanagement.

[10] ACNC Taskforce's You Tube page - http://www.youtube.com/acnctaskforce

[11] ACOSS stated that "The intention (as articulated in the Explanatory Memorandum to the Bill) that the ACNC's preference should be to assist NFPs to comply with requirements through education rather than to investigate entities for possible breaches should be enunciated in the Bill".

[12] Australian Council of Social Service, 'Response to the Treasury Australian Charities and Not-for-Profit Commission Exposure Draft and Governance Arrangements Consultation Paper', January 2012, page 9.

[13] 'Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012', The Not-for-Profit Project, University of Melbourne Law School, page. 18, and Australian Council of Social Service 'Response to the Treasury Australian Charities and Not-for-Profit Commission Exposure Draft and Governance Arrangements Consultation Paper', page 10.

We recommend this hierarchy of objects be included as outlined above. The objects should appear with a statement guaranteeing the independence of the ACNC (see also comments under 'Independence' below).

Regulatory principles

The Bill needs to be drafted with an emphasis on the principles of good regulation including reasonableness and proportionality, particularly to counter the current emphasis on compliance and enforcement.

We endorse the Melbourne University comments in relation to regulatory principles. We support the introduction of principles similar to those found in the *Tertiary Education and Quality Standards Agency Act* (Cth) 2011 and the requirements in comparable overseas legislation for the regulator to 'have regard to the principles of best regulatory practice'.

The Guide to the Bill also needs to encapsulate the overarching regulatory principles as discussed above in relation to the 'tone'. The point made in the second paragraph of the Guide about accountability needs to be broadened. We agree that NFPs need to be accountable, however many NFPs do not receive any funding from donors, governments or the public. The vast majority of NFPs are member-based and the provision needs to be amended to reflect this.

The ACNC's role (referred to below) also needs to extend beyond just providing NFP entities with 'access to information about the sector and educational and guidance materials'. This statement suggests that the ACNC is only providing statistics on the sector to relevant organisations, rather than fulfilling a broader educative function as discussed above, by providing advice and information about how to comply with ACNC obligations.

Functions

Generally the function provisions in the Bill are well drafted. However we support the Melbourne University recommendations for changes in the drafting of some of the functions and the addition of more functions, including the express function of determining NFP, charitable and Public Benevolent Status.

We emphasise the importance of improving the drafting of the education and advice function. Improving the legal literacy of NFPs and their advisers is the first step to improved compliance and the adoption of good governance practices. Therefore it is an extremely important function which is worthy of an express legislative power.

We endorse the Melbourne University recommendation that the ACNC should educate and advise entities in relation to compliance with their legal obligations as well as stimulating and promoting research. However (as stated in our submission to The Treasury's consultation paper on the scoping study for a national NFP regulator), we do not support the ACNC 'covering the field' and thereby duplicating the range educational materials and services currently provided by peak bodies and sector-based support services. We recommend that:

- education and compliance initiatives of the ACNC be specifically focused around the provision of accessible advice, information, guidance material and technologies to assist NFPs to understand their obligations and interface with the ACNC; and
- government funding be made available for sector-based support services to assist NFPs in meeting their new compliance obligations and supporting good governance practices.

Independence

The independence of the Commissioner is not set out anywhere in the Bill. As stated by The Treasury in the consultation paper to the scoping study for a national NFP regulator, 'an independent national NFP regulator would provide the greatest benefits to the public, the sector and to governments, in terms of reducing red tape and … streamlining reporting arrangements.'[14] Independence is also necessary to manage effectively the relationships with other regulators and government. We recommend inserting at the beginning of the Bill in the functions provision, a clause setting out how the independence of the regulator will be asserted and maintained.

3. Scope of regulatory powers

We are, in particular, concerned about the following provisions:

- eligibility to register including disallowing registration for those entities previously registered;
- the grounds for revoking registration; and
- the grounds for issuing directions and warnings.

We refer to and endorse recommendations 11 - 21 of the Melbourne University submission.

Eligibility to register

A key concern is clause 5-10(1A)(d) which restricts registration to an entity not previously registered. This clause must be deleted.

The Treasury indicated in an expert roundtable we attended in Melbourne that the intention is that all entities will automatically be wound up upon de-registration. As far as we can see, this is not provided for in the Bill or referred to in governance discussion paper. We endorse the Melbourne University submission on this point and re-iterate the impracticalities of such a provision.

The following case study highlights the difficulties with the provision as drafted and how the problems would be exacerbated by a provision providing for automatic winding up on de-registration.

[14] Scoping Study for a National Not-for-Profit Regulator, The Treasury Consultation Paper, January 2011, at 131.

Case study

Young People in Need (a registered ACNC charity) has had the same secretary, Bob, looking after the organisation for five years. Sally, a new member of the organisation, is elected to the position. Sally is excited by her new volunteer role.

After reviewing the organisation's documents, getting her head around the legal requirements and checking the ACNC website, Sally realises that Young People in Need is shown as being de-registered. Sally discovers that Bob (a founder of the group who became busy at work) hadn't filed the last few financial reports with the ACNC. But he had made sure annual general meetings were held every year, with audited financial reports presented and approved by the members and copies sent to all funders and other stakeholders. Young People in Need are actually regarded by many as a small well run group that gets things done.

Sally contacts the ACNC to explain the issue and work out the best way to submit the reports, and get re-registered. She learns that before they were de-registered the ACNC made several unsuccessful attempts to follow them up (Bob had not notified them of the new contact details).

What's worse, after being de-registered, the ACNC (in accordance with the ACNC Act) have wound-up Young People in Need, again without them realising – they didn't see the advertisements in the business section of the paper. Sally realises that the organisation has been operating without an incorporated legal structure for the past year. It is such a mess!

She pleads with the ACNC to renew the registration and re-instate Young People in Need as a registered charity. She is willing to give undertakings about future compliance and Bob wants to pay any fine. But apparently the organisation will need to incorporate again. Despite their concern, the ACNC explains it is powerless to help.

Sally tries the ATO help line. They explain the organisation actually owes tax on their income for the past year and shouldn't have given tax receipts to their donors because they weren't registered with the ACNC. The Board discover other issues including that the winding-up has triggered termination clauses in their insurance and funding contracts. Their reputation will be shot to pieces once this all gets out. The service is shutdown and there is considerable disquiet about it in their local community.

Entities may wish to voluntarily de-register and should be able to do so without having to be wound up. To provide otherwise is hardly a voluntary system because it, in effect, forces them to remain registered for the duration of their 'life'. For example, a group might think it needs deductible gift recipient status (**DGR**), but after several years they realise they never use it because they rely on membership fees and their other (non-mutuality income) rarely generates any net income.

We understand that in New Zealand and the UK hundreds of charities are removed when they fail to respond to compliance notices with their Charity Commissions assuming that they are no longer active. Inevitably

many then come forward and say they changed address, their treasurer was in hospital at the time, they were not aware of certain legal requirements etc. This is consistent with our case work experience.

To require incorporation of a new entity in order to get things back on track is counter to the aim of reducing red tape and regulatory burden, including the burden placed on ACNC resources.

If the reasoning behind the provision is to avoid an entity de-registering and then converting to a 'for-profit' entity and distributing profits to members, we believe this issue would be better addressed in the upcoming review of the company limited by guarantee provisions of the *Corporations Act* 2001 (Cth). For example, by requiring the consent of the ACNC before a company limited by guarantee can convert to a proprietary limited company.

Revoking registration

We are concerned about the low thresholds for revocation listed in the Bill. In particular we mention two aspects (the Melbourne University submission has others that we also support).

First, the ability under clause 10-55(c) to revoke registration for any failure to comply with the Act or any direction given under Division 140 of the Act, is draconian, particularly given the current intention to wind up any de-registered entity. Inadvertent and unintentional breaches can often result from small volunteer run charities not being able to keep up with the volume and complexity of regulatory requirements (including relevant sub-sector accreditation standards). They should not be penalised to this degree for such breaches. We appreciate that the Commissioner may not exercise this power as a first option, however this provision makes it possible. The New Zealand approach requiring a 'significant or persistent' failure to meet legal obligations as the threshold for revocation (and other powers) should be adopted [15].

Secondly, revoking registration on the grounds of the entity being 'likely to become insolvent' should be deleted. If an organisation is 'likely' to become insolvent the ACNC should be able to work with them to facilitate a merger or orderly winding-up, rather than simply revoking their registration. Many small NFPs often operate from grant to grant and such a provision could see many liable for de-registration on a regular basis. This provision could effectively deter charities from using voluntary administration procedures[16] or other procedures that may be open to them under their constituting legislation or Act.[17] This is not appropriate.

Directions and warnings

We agree that the Commissioner needs a broad range of enforcement tools.

The Bill confers power to give directions where a registered entity 'has contravened or is likely to contravene any provision of the Act', to 'advance the purpose' of the entity, to prevent 'improper or financially unsound' conduct and to 'promote the object of the Act'. However, the use of these tools needs to be linked to requirements about when they can be used, based on a graduated scale of severity.

[15] Charities Act 2005 (NZ), s.32.

[16] Voluntary administration specifically exists to support the chance to trade out of difficulty - ie. it is a good remedy that shouldn't be undermined.

[17] In Victoria statutory management of incorporated associations is set out in the Associations Incorporation Act 1981 (Vic), Part VIIAB.

Similar concerns apply to the Commissioner's power to issue an formal warning where there are reasonable grounds for believing there has been 'mismanagement in the administration of a registered entity'. 'Mismanagement' is a very broad term and 'mismanagement' is not of itself a breach of the Act. This provision inappropriately strays into inference with internal organisational matters.

The Guide to this section of the Bill needs to emphasise that all these powers are to be used reasonably and in proportion to the seriousness of the potential breach/issue, if the breach was wilful or inadvertent and having regard to the size and resources of the entity.

5. Procedural fairness

The procedural fairness matters that we want to highlight are:

- the inclusion of multiple strict liability offences in the Bill - clauses 50-5(6), 55-45(3), 55-50(3), 55-55(7), 55-60(7), 55-70(2), 120-20(2), 143-165(6);
- the time line set for responding to 'show cause' notices.

We refer to and endorse recommendations 22 – 31 of the Melbourne University submission with the addition of a recommendation that the time to respond to a show cause notice be 28 days or more if the Commissioner allows, as discussed below.

Strict liability offences

We agree with the Melbourne University submission that there is 'no justification for departing from the general principles of criminal liability' and offences of non-compliance should not be strict liability offences.[18] Again, the better approach is to give the Commissioner a discretion so that factors such as the size and circumstances of the entity can be considered.

'Show cause' notices

We do not believe the 10 day time period for an entity to respond to a 'show cause' notice under clause 10-62 is sufficient. We appreciate that a 'show cause' notice may be a relatively last resort tool for the Commissioner, however, 10 days is not a sufficient time for any organisation (large and complex or small and volunteer run) to respond. We note that the Melbourne University submission suggests the New Zealand provision which allows 20 working days for a response to be issued. We recommend that the time to respond should be amended to 28 days 'or such longer period as the Commissioner allows'. This discretion allows the Commissioner to weigh up factors such as whether or not any harm has flowed from the potential breach, the complexity of complying with the notice etc.

6. Registration

We raise two main concerns about the registration provisions:

[18] 'Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012', The Not-for-Profit Project, University of Melbourne Law School, 21 January 2012, page 33.

- the information to be published on the register; and
- ensuring the Register is freely searchable by the public in line with the object of supporting public trust and confidence.

We refer to and endorse recommendations 32 - 34 of the Melbourne University submission.

Publication of information on the register

We agree with the Melbourne University submission that it would be useful to insert a provision setting out the purpose of the register. This could be included at the end of clause 100-10 in a new part (4), or in the Guide to Chapter 4. We agree that the purposes listed in the New Zealand equivalent provision could be a useful inclusion to the Bill. This will help guide the determination of when the public interest in the publication of information may outweigh private interests in confidentiality.

The publication of warnings issued against an entity should also include information about the result of that action. This is critical if the allegations are not subsequently proved.

Searching the register

Clause 100-10(3) is badly worded. We agree with Melbourne University that the clause needs amending to specify that the Register is to be publicly available on the internet and that any searching is free. This is a core aspect of the object of supporting public trust and confidence.

6. Reporting obligations

Our concerns on reporting relate to:

- the duty to keep records to explain an organisation's operations and acts;
- tiered reporting and timing; and
- the requirement for records to be kept in English or 'readily accessible and easily convertible into English'.

We refer to and endorse recommendations 35 - 41 of the Melbourne University submission.

Duty to keep records

The duty to keep records is too vague and overly burdensome for small NFP's. Not only would the current requirements increase the compliance burden on NFP entities, but they are inconsistent with current reporting requirements.[19] We endorse the Melbourne University recommendation that, for the lowest tier (that is, small charities), this requirement needs to be amended to require a specified minimum level of record

[19] Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012, The Not-for-Profit Project, University of Melbourne Law School, p.48.

keeping namely, 'contact details, governance rules, members and officers, meetings, and possibly a summary of its activities'.[20]

Tiered reporting and timing

We support the changes to tiered reporting suggested by Melbourne University and agree DGR is not a clear indicator of whether an organisation is engaged in public fundraising. Taking DGR out of the tiered reporting thresholds and basing reporting purely on size will simplify administration and bring reporting in line with State and Territory incorporated associations' legislation.

Allowing an entity to nominate the relevant accounting period when registering with the ACNC, rather than 'applying to the Commissioner in the approved form' will prevent additional unnecessary work for charities and the ACNC.[21] Clause 55-90 needs to be amended accordingly.

Lodgement of the reports should be amended to a period of within 6 months of the end of the entity's financial year, in line with a majority of the incorporated associations' legislation.[22] This slightly extended time period takes into account the difficulties of accessing registered company auditors in rural and regional areas. Further, as discussed by Philanthropy Australia, because many charities rely on pro bono or discounted accounting and auditing services, more time is appropriate.[23]

English translations

We agree with the Melbourne University submission that clause 50-5(3) should be amended to allow for records to be kept in any language, and only require an English translation to be available within a reasonable time to the ACNC or a person entitled to inspect the records and request such a translation. Some of the organisations we assist have English as their second language, often they are run by volunteers. They are not in a position, financially or linguistically, to continually ensure that records are kept in English. Their scarce resources should not be dedicated to this unless it is a reasonable request made by a person entitled to inspect a translated copy.

7. The ACNC and Advisory Board

Our concerns with this part of the Bill include:

- the ability to recruit, direct and remove staff of the ACNC; and
- the limited powers of the advisory board.

We refer to and endorse recommendations 42 and 43 - 50 of the Melbourne University submission. In relation to their recommendation 44, we recommend the Commissioner of Taxation should be bound by the

[20] Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012, The Not-for-Profit Project, University of Melbourne Law School, p.47 - Recommendation 35.
[21] Clause 55-90(1) Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012, p.34
[22] Submission to Treasury, Exposure Draft, Australian Charities and Not-for-Profit Commissions Bill 2012, The Not-for-Profit Project, University of Melbourne Law School, p.53/4 - Recommendation 41.
[23] Philanthropy Australia response to the Consultation Paper - Review of Not-for-Profit Governance arrangements and Exposure Draft - Australian Charities and Not-for-Profit Commission Bill 2012, point E.

ACNC Commissioner's advice in relation to the staffing of the ACNC, rather than just being required to 'consult' with the ACNC Commissioner.

ACNC staffing

It is vital to the independence of the ACNC - and to the public's trust and confidence in it and the NFP sector's willingness to cooperate with it - that the ACNC Commissioner can appoint and remove employees of the ACNC. The reference in clause 163-5 to the Commissioner of Taxation making staff 'available' is woefully inadequate. If there is some technical reason that the ACNC staff must be employed by the Commissioner of Taxation, either that technicality should be removed, or the provision must state that 'the Commissioner for Taxation will, in accordance with advice from the [ACNC] Commissioner, appoint and remove the staff'.

Advisory Board

Clause 170-15 needs to be amended to allow the Advisory Board to consider matters and give advice and recommendations on its own initiative, not just on matters raised by the Commissioner. Further, for the Advisory Board to have any point (and therefore to be a justifiable cost), the Commissioner should be required to at least *have regard to* the decisions made by the Advisory Board. This does not mean the Commissioner is *bound* by the decisions. Clause 161-15 should be amended to reflect this requirement.

8. Information sharing

With a stated policy intention of reducing regulatory duplication, it is essential that the Bill contains a provision for the ACNC to consult and share certain information. We recommend that disclosure between the ACNC, other regulators and law enforcement officials be provided in relation to serious, repeated or continuing potential offences or contraventions of the Bill.

We refer to and endorse recommendations 51 - 55 of the Melbourne University submission.

9. Concept of 'Responsible Individual'

The definition of a 'Responsible Individual' is confusing and needs to be redrafted as recommended in the Melbourne University submission. It must be easy for a volunteer committee or board member to work out what provisions apply to them.

We have also raised this concern in the NFP governance consultation paper.

We refer to and endorse recommendations 56 - 58 of the Melbourne University submission.

10. Other

As discussed above (heading 2, functions of the Commissioner), independence of the regulator is crucial and should be reflected throughout the Bill and specifically stated in a statutory guarantee of independence.

The transitional provisions must ensure that the introduction of the ACNC does not unduly increase the compliance burden on the sector. We are disappointed these have not been made available for review.

We refer to and endorse recommendations 59 - 64 of the Melbourne University submission.

Conclusion

In conclusion we urge The Treasury:

- to implement the recommendations contained in the Melbourne University submission with the variations that we have highlighted (see headings 2, 6 & 7) to ensure the ACNC has the best chance of achieving its objects and becoming a world class regulator; and
- to defer the introduction of governance provisions into the Bill as submitted in our other submission (dated 27 January 2012).

We would be happy to elaborate on any of the issues raised in this letter. Our contact details are below.

Yours sincerely,

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Appendix A - About PILCH and PilchConnect

The Public Interest Law Clearing House (Vic) Inc. (PILCH) is a leading Victorian, not-for-profit organisation. We are committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice; and
- foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

PilchConnect is PILCH's specialist service that provides NFPs with access to free or low cost, high quality, practical and plain language legal help (information, advice and training). We understand our NFP clients are time poor, often working in a volunteer, 'out of hours' capacity. We help those NFPs that cannot afford (or otherwise access) private legal advice and prioritise those in rural and regional areas.

We support small-medium NFP community organisations to be better run. We do this because well-run NFPs are more likely to achieve their mission, and because public trust and confidence in the NFP sector is likely to be improved. By supporting NFPs in this way, we aim to contribute to a better civil society and more connected communities.

Our experience has confirmed that, with support at key points during their organisation's lifecycle, those involved in running NFPs can be empowered to handle common legal and legally related issues themselves (for example, incorporation, changing their rules, obtaining taxation concessions). Our integrated service model helps NFPs navigate the complex regulatory maze – both their general legal obligations and NFP-specific issues such a charitable fundraising.

We believe improving the legal literacy of NFPs and their advisers is the first step to improved compliance and the adoption of good governance practices. Our help supports NFPs to be run more effectively, efficiently and sustainably – we 'help the helpers' preserve their limited resources for delivering their mission, such as services or advocacy for those experiencing disadvantage. A strong, well governed NFP sector will enjoy increased public trust and confidence and, with that essential backing, the sector will be able to sustain and even grow its vital contribution to the well-being of all Australians.

We fill a niche role, sitting between regulators and the private legal profession. If those involved in running an NFP are not sure about how to comply (or realise they have not complied), they will seek advice from us but would be concerned about approaching a regulator. As an independent, sector-based intermediary they know we will understand the practical constraints they operate under. We often help them work out if they really do have a legal problem, how serious it is and what are the possible next steps.

To address systemic issues, we undertake campaign work. This is directed to achieving a smarter legal framework for NFPs, and reducing red tape. Our client work provides a rich evidence base to explain the practical implications of existing laws (and the often unintended consequences of proposed laws) on small, volunteer-run NFPs. To influence a shift in norms and, in turn, bring about policy and law reform in the areas that will achieve the greatest benefit for small-medium NFPs, we recognise the importance of having strong organisational capacity, alliances and support base.