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The Treasury
Langton Crescent
PARKES ACT 2600

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By email: ACNCReview@treasury.gov.au

Review of the Australian Charities and Not-for-profit Commission (ACNC) legislation

Dear Mr Crowe

I refer to the Terms of Reference for the Review of the Australian Charities and Not-for-profit Commission (ACNC) legislation (the Review) announced on 20 December 2017. The Terms of Reference note that the Review should evaluate the suitability and effectiveness of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (together, the **ACNC Acts**). In particular, the Review should:

1. Examine the extent to which the objects of the ACNC Acts continue to be relevant.
2. Assess the effectiveness of the provisions and the regulatory framework established by the ACNC Acts to achieve the objects.
3. Consider whether the powers and the functions of the ACNC Commissioner are sufficient to enable these objects to be met.
4. Consider whether any amendments to the ACNC Acts are required to enable the achievement of the objects and to equip the ACNC Commissioner to respond to both known and emerging issues.

I wish to make 3 comments:

- (i) Any review should note the achievements of the ACNC during its first 5 years. Significant time and effort and careful consultation went into the establishment of the ACNC and the objectives referred to were formed in consultation with the Not-for-profit (NFP) sector. It would be a great pity if the good relationship with the sector was to be undermined after such a successful 5 years. Two matters, in particular, deserve mention: the establishment of the Charities Register which enables the public (and the Regulator) to have access to important information about the purposes and activities of 'registered charities'. The government should be committed to ensuring this transparency is maintained without imposing additional burdens

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of reporting – this would be contrary to the government’s stated objective of reducing ‘red tape’. The second outstanding achievement of the ACNC is the production (and analysis) of data about the charitable sector. I note especially the Australian Charities Report produced with the assistance of the Centre for Social Research and the Social Policy Research Centre.¹ This has provided invaluable information and insights for those interested in researching the sector and for the sector itself. Furthermore, no review of the first 5 years should fail to mention the outstanding contribution of the inaugural Commissioner, Ms Susan Pascoe. Without her drive, common sense, grace under pressure and commitment to the sector, the ACNC would no longer exist. It is also important to note that for a significant period the ACNC was faced with the prospect of being abolished. Perhaps surprisingly, the sector itself let the government know that it supported the regulator.²

- (ii) As a long-time researcher in the NFP area, and having seen comparable attempts at regulation of the sector during a period spent at the Organisation for Economic Cooperation and Development (OECD) in 2015 considering NFP tax and regulatory reform, there are some matters that I believe do need to be addressed as follows:
 - The exemptions under the principal ACNC Act for a ‘basic religious charity’ (BRC) should be removed. These exemptions were included in the Act as a result of lobbying by the established religious entities and they will, no doubt resist the removal of the exemptions. The exemptions serve no logical purpose and are limited to those religions that are unincorporated. Newer religions that adopt a legal form for operation are discriminated against. In relation to reporting, if the BRC has revenue less than \$250,000 (or some other appropriate minimum) it will only have to undertake minimal reporting. BRCs should, like all other charities, also be subject to the governance standards. As a result of the Royal Commission into Institutional Responses to Child Sexual Abuse³ it is no longer appropriate to assume that the governance of religious entities will always be of a high standard.
 - The issue of the duties of responsible persons needs to be updated to bring the duties in line with directors’ duties under the Corporations Act. My colleagues, Professor Ian Ramsay and Miranda Webster have recently published an article that draws attention to the gaps in the regulation of officers of a charity.⁴ A related point is that the Commonwealth does not have power to regulate charitable trusts. This

¹ See, for example, the Charities Report 2016, released December 2017:

<http://australiancharities.acnc.gov.au/download>

² Judith Ireland, ‘Charity sector says the Government has got it wrong on charities watchdog’, *Sydney Morning Herald*, 8 September 2014: <http://www.smh.com.au/federal-politics/political-news/charity-sector-says-the-government-has-it-wrong-on-charities-watchdog-20140908-10dycq.html#ixzz3CszqlmNd>

³ See Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, 15 December 2017 at: <https://www.childabuseroyalcommission.gov.au>

⁴ I Ramsay and M Webster, Charities and Governance Standard 5: An Evaluation, (2017) 45 *Australian Business Law Review* 127.

remains the domain of State and Territory Attorneys-General but they have little interest in setting up an appropriate regulatory regime. The Commonwealth should explore the possibility of obtaining a referral of power in this area and, in addition, suggest that the Commonwealth definition of a ‘charity’ be adopted in the States and Territories. This would significantly reduce the compliance burden for charities.

- The notion of tiered reporting has been highly successful. However, the tiers do not seem to reflect the current structure of the sector. In fact, most charities have annual revenue of less than \$250,000. The Charities Reports indicate that very many have revenue of less than \$50,000.⁵ The tiers should be reviewed which may mean that additional charities are required to provide basic financial information. This is not likely to impose a huge compliance burden as such charities should be able to submit their own financial statements. This would improve transparency.

- (iii) My final comment relates to the submission to the Review by the ACNC.⁶ One of the recommendations is as follows:

“Consider adding the following objects in s15-5 of the ACNC Act:

- (a) To promote the effective use of the resources of not-for-profit entities; and
- (b) To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.”⁷

In my view, there is no need for an object that gives the Commissioner such powers. The current objects of the principal Act are:

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

The proposed recommendation both duplicates the current objective relating to ‘public trust and confidence’ and is also potentially in conflict with the objective relating to ‘reduction of unnecessary regulatory obligations’. The government has indicated that it will not impose restrictions on environmental charities engaging in advocacy and there does not appear to be any reason to interfere with the use of resources by charities in this way. If the ACNC believes that there is malfeasance they have sufficient powers to deal with any wrongdoing.

⁵ The Charities Report 2016, n 1.

⁶ ACNC submission to the Review into the ACNC legislation, 19 January 2018:

http://www.acnc.gov.au/ACNC/Comms/LN/LN_20180119.aspx

⁷ Ibid, Rec 2.

Although there are numerous other matters that could be raised, in the limited time that the Review has, I suggest that the focus be on the sector itself and what matters the sector believes need to be reviewed.



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