

**Submission on the Exposure
Draft of the Australian Charities
and Not-for-profits Commission Bill**

Introduction

Research Australia is the peak body representing the Health and Medical Research sector in Australia. Independent of government, Research Australia's activities are funded by its members, many of which are Not-For-Profit (NFP) entities.

Research Australia notes that the Australian Charities and Not-for-profit Commission Bill aims to:

- promote the good governance, accountability and transparency of NFP entities, and
- to minimise regulatory duplication and simplify such entities' interactions with governments.

Research Australia is broadly supportive of these aims. In respect of NFP entities in the Health and Medical Research sector at least, Research Australia believes that the second of these aims is more important. The imposition of new reporting and other regulatory requirements on entities that are already established and operating under a range of governance structures and legislative regimes as a condition of registration with the ACNC will be of little public benefit. It would, however, add further complexity and regulatory burden to these entities.

One of the roles of Research Australia is to encourage and facilitate philanthropic investment in health and medical research. Promoting the exchange of information between philanthropists and the NFP sector is key. Research Australia acknowledges the value of a comprehensive register of NFP entities which can be used to make information about the NFP sector and individual entities available to interested parties.

Research Australia is also aware that the Government proposes to engage the State and Territory governments in discussions about harmonising the regulation of the NFP sector. Research Australia is supportive of this initiative and recognises that any harmonisation process is likely to be slow and difficult, and to occur in several phases over an extended transition period.

In this transition period, there is significant scope for an increase in regulatory duplication between the ACNC and State based agencies, and between the ACNC and other Commonwealth agencies, such as the Australia Securities and Investments Commission. Research Australia submits that in this transitional period, the ACNC's principal role in respect of existing NFP entities should be the creation of a register and public portal.

Conditions for registration of existing entities should be limited to collection of the information needed for the register until such time as the responsibility for regulating and monitoring specific types of NFP entities is transferred to the ACNC from the other existing State, Territory and Commonwealth Government agencies.

The ACNC would have comprehensive responsibility for regulating new NFP entities created under the ACNC legislation which are not also regulated by another agency.

Any other approach will lead to an increase in regulatory duplication, contrary to the aim of the legislation, and will adversely affect the sector's support for the legislation.

The ACNC's other key role in this transition period will be seeking to drive improvements in the regulation of the NFP sector, including greater standardisation of reporting and governance requirements placed on the sector by Commonwealth, State and Territory agencies. There are significant benefits available to the NFP sector and the broader community in reducing the regulatory burden and improving efficiencies. The ACNC would appear to be perfectly placed to drive this standardisation.

The following comments on specific aspects of the Bill are provided within the context of the views expressed above.

Comments on specific provisions of the ACNC Bill

'Public benefits'

The object of the Bill is 'to promote public trust and confidence in NFP entities that provide public benefits'. There is at least an implicit recognition in this wording that there are some NFP entities that do not provide public benefits, and it is expected that whether an entity provides 'public benefits' will be one of the basic criteria used in determining the eligibility of an entity for registration.

Despite the significance of this term, 'public benefits' is not defined in the Bill. Research Australia submits that this term is open to wide interpretation. Research Australia submits that 'public benefits' should be defined in the Bill.

Consideration should also be given to the eligibility for registration of NFP entities for which the provision of public benefits is only part of their activities. For example, Research Australia is the NFP peak body for the Health and Medical Research sector. Its mission is to make health and medical research a higher priority for the nation, and its goals include ensuring Australia captures the benefits of health and medical research, and that society is well informed and values the benefits of health and medical research. As a peak body, Research Australia also provides services to its members. In addition to a range of NFP entities, these members include corporations and businesses. Depending on the definition of 'public benefits' some of Research Australia's activities might qualify while others may not. The same is broadly true of many membership based peak bodies in a range of industry sectors. Research Australia submits that the Bill needs to clarify the proportion of an entity's activities that need to provide public benefits for an entity to be eligible for registration.

Division 5- Entitlement to registration

Clause 5-10 (1A) specifies the registration requirements. Further to the comments above, sub clause (a) requires that the entity be a NFP entity, but not that it must be a NFP entity that 'provides public benefits'.

Research Australia is aware the governance requirements are part of a separate consultation, and it is assumed that this will lead to the creation of the governance requirements referred to at Clause 5-10(1A)(b), as none are contained in the exposure draft. As discussed above, Research Australia submits that it should be possible for an existing NFP entity that is subject to governance requirements under other State, Territory or Commonwealth legislation to be registered without being subject to another layer of regulation.

There are benefits from registration, including the provision of information to the public, which are quite separate from the benefits of regulation by the ACNC. Research Australia submits that complying with the governance requirements of the ACNC Bill should not be a condition of registration for existing NFP entities that are currently regulated by other government agencies.

10-20 Dealing with an application for registration

Clause 10-20 provides some time lines in relation to the registration of entities but places no obligation on the Commissioner to make a decision within a specified period or to communicate with the applicant if and when there are delays.

Under clause 10-20(2) the applicant is entitled to treat an application that is not decided within 60 days as if it has been declined. The applicant must notify the Commissioner that the applicant has exercised this discretion and can then seek a review of the decision. This will, of course take a considerable period of time. In the meantime, presumably, the Commissioner will stop processing the application and/or advancing it in the application queue.

This is a most unsatisfactory situation, particularly where registration is a condition for receipt of tax concessions, government grants, or public funding. It provides no incentive for the Commissioner to ensure that registration processes are efficient or that sufficient resources are committed to the registration process.

Research Australia submits that, at a minimum, the sixty days should be a deadline within which the Commissioner is required to make a decision to accept or reject an application; or notify the applicant of the delay in processing the application, and provide an estimation of when a decision will be made.

The notification of the delay could itself be a reviewable decision, but action by the applicant to seek a review should not cause the Commissioner to stop the application assessment process.

55-85 Additional Reporting Requirements

Clause 55-85 refers to classes of registered entities. It is not clear whether this is meant to be a 'type or sub-type' of entities, in which case these expressions should be used, or whether it allows the Commissioner to determine the entities to which it will apply a determination without reference to a particular type or sub-types. Clarification of the intended meaning of 'class' would be useful.

55-90 Commissioner may approve a different accounting period

Clause 55-90 allows the Commissioner to 'approve' a different accounting period. This is consistent with the provisions relating to taxation but is inconsistent with the requirements under the Corporations Act.

Research Australia submits that in this regard, the ACNC's role is closer to that of ASIC than the ATO, and the Commissioner's approval should not be required. Changing the accounting period should be a matter for the entity to determine, subject to some basic requirements about the length of the period. Research Australia submits that the requirement to seek the Commissioner's approval should be replaced with a requirement to notify the Commissioner of the change in the accounting period.

Sub-clause (3) enables the Commissioner to make directions that are reasonably necessary in relation to the new accounting period and could be retained, to ensure that the Commissioner is able to continue to appropriately monitor the entity involved.

120-10 Investigation powers

Clause 120-10 gives the Commissioner a broad power to require an entity, including an individual, to provide information.

This is a sweeping power to compel any individual, body corporate, partnership etc. to provide information about any entity, and be examined by the Commissioner. Failure to comply is a strict liability offence. The only restriction on the power is that the Commissioner must exercise this power for the purposes of the Act.

Unlike Clause 140-110, it is not clear what right a person has to object to a direction. Research Australia submits that, at a bare minimum, a right to review should be made clear.

120-20 Failure to Comply

Clause 120-20 imposes an offence of strict liability on an entity that refuses or fails to comply with a requirement under section 120-10. Research Australia submits that this should not be a strict liability offence. It also raises the question of whether the registered entity or an individual responsible person would be held liable where the direction is to an individual in their capacity as responsible person of a registered entity.

If it is the individual who is (or may be) liable, consideration needs to be given to the implications of this for discouraging responsible persons from accepting such appointments, and issues relating to registered entities indemnifying responsible persons against such penalties.

This clause can be contrasted with Clause 140-120, which more clearly distinguishes offences committed by a registered entity and offences committed by a responsible person of a registered entity.

120-100 General powers of investigation

Clause 120-100 provides the Commissioner with a power to conduct an investigation, but does not provide a general power to refer a matter to police, the taxation Commissioner etc. It would seem that such a power would be desirable. Clause 180-30 permits disclosure of information to an authority of the Commonwealth, State, or a Territory, but only if it is for the purposes of this Act. In the absence of a clause authorising the Commissioner to refer matters, it is not clear that disclosure of potential criminal behaviour, for example, would be 'for the purposes of this Act'.

Conclusion

Research Australia supports the general direction of the reforms proposed by this Bill and recognises that it has the potential to improve the effectiveness of the NFP sector. We remain concerned about the potential for regulatory duplication for entities that already exist.

Research Australia has appreciated this opportunity to make a submission.