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**Family & Relationship
Services Australia**

**Submission to the Review of Not for
Profit Governance Arrangements –
Consultation Paper & the ACNC
Legislative Exposure Draft**

January, 2012



About FRSA

Family & Relationship Services Australia (FRSA) is a national peak body. Our purpose is to provide national leadership and representation for services that work to strengthen the wellbeing, safety and resilience of families, children and communities. FRSA member organisations deliver services in more than 650 locations across Australia and consist primarily of non-profit organisations embedded in local communities.

FRSA provides support to members and draws on their expertise to understand the changing needs of families accessing services and to inform public policy. FRSA also works collaboratively with the Australian Government and its agencies. FRSA receives funding through the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to provide sector representation and support to services funded under the Family Support Program which has three core streams:

1. **Community and Family Partnerships:** providing intensive and coordinated support targeted to disadvantaged communities and families, especially where children are at risk.
2. **Family and Parenting Services:** providing early intervention and prevention services to families to build and strengthen relationships, develop skills and support parents and children.
3. **Family Law Services (Attorney-General's Department responsibility):** assisting families to manage the process and impacts of separation in the best interests of children.

Many of FRSA members deliver a mix of other Australian Government and State/Territory Government funded programs, such as:

- Family violence and sexual assault services
- Child protection services
- Family support
- Community legal services
- Crisis accommodation and support
- Community/neighbourhood centres
- Disability and carer support services
- Mental health services
- Children's services

FRSA works collaboratively with related service networks, peak bodies and advocacy groups to promote effective support for families across these and many other program areas.

For more information visit www.frsa.org.au.



Executive Summary

This submission is responding to the exposure draft legislation on the establishment of the Australian Charities and Not-for-profits Commission (ACNC) and the consultation paper on Governance Arrangements in the Not-for-Profit (NFP) sector, both released by Treasury in December 2011.

FRSA supports the Government's purpose in establishing the ACNC and welcomes this governance review. The aims to centralise and simplify the existing arrangements in order to reduce red tape and minimise compliance burdens for the NFP sector while encouraging further public confidence in the sector is welcomed by all FRSA members.

FRSA also supports the need for appropriate governance processes including management accountability & financial reporting. FRSA is of the view that these requirements should be determined and implemented via a collaborative process between Government and the Sector. To this end, FRSA makes this submission in a spirit of collaboration and good faith.

FRSA has concerns with both the process and content of the exposure draft and the tenor of the proposed governance arrangements. These concerns include:

1. The rapid process of drafting complex enabling legislation with no regulatory impact statement or adequate time for detailed consultation;
2. The expansive scope of the enabling legislation for the Commission;
3. The lack of clarity about the independence of the Commission;
4. The prescriptive tenor of the governance arrangements proposed;
5. The lack of clarity in the legislation regarding interim arrangements and the lack of a proposed timeframe for implementation of full reforms across Australia.

Further, we are concerned by the nature of the legislation that the Government intends to ignore key recommendations for the national NFP regulator as set down by the Productivity Commission (2010).

Finally, FRSA supports the need for action after numerous reviews. However, the decision to maintain such a tight legislative timeframe including the July 2012 implementation has meant an inadequate amount of time for consultation at an inappropriate time for NFP representatives.

Given the complex issues and legislation required, we strongly advocate 'a broad and considered approach to interim & long term measures' in the drafting of legislation & governance requirements. This will help ensure that subsequent implementation will not increase red tape adding further to the existing compliance burden on NFPs. Failure to follow due process potentially undermines much of the strong sector support that has been established in the process to date.



Introduction

The family and relationship support sector is vibrant, diverse, innovative and resourceful. It is characterised by organisations that are focused on a mission to achieve social change through the provision of a broad range of family and relationship support services to the Australian community. Some of these organisations have been part of the Australian landscape since before Federation; others have formed more recently in response to emerging community needs or a newly defined cause.

All FRSA members are Not for Profit (NFPs) organisations that are predominately companies limited by guarantee, Incorporated Associations or unincorporated religious organisations. It is presumed that all member organisations will eventually come under the regulation of the soon to be created Australian Charities and Not-for-Profits Commission (ACNC) and as such have a significant stake in the arrangements the Commission will be enforcing.

There are in excess of 150 FRSA member organisations that support a broad range of children, families and individuals across Australia. These member organisations range in size from small NFP's with less than 10 paid staff operating in a single geographic location and on a budget of around \$250,000 to large NFPs with over 500 paid staff operating in multiple locations and on a budget exceeding \$25m per annum. Across this spectrum, many receive a mix of Federal, State & Territory and Local Government funds as well as monies from philanthropic institutions, public donations, member or client fees and/or from income generating programs.

This submission draws on the diverse nature of our membership as representative of the broader Australian community services sector that are subject to the cross jurisdictional regulations at which these reforms are aimed.

FRSA members have provided input into a range of Government consultations on these matters over the past decade. Members feedback has consistently demonstrated the current governance arrangements for NFPs in Australia are too complex, inconsistent, lacking transparency and not providing meaningful support or information to stakeholders. Existing arrangements/requirements are duplicated across different jurisdictions and create high and unnecessary compliance costs.

FRSA supports the establishment of high-level principles-based mandatory requirements for registered entities, as well as some good practice guidance. This support is based on the Government's assurances that core governance principles will provide flexibility so that any requirements are proportional. That is, what a small NFP must implement to satisfy the requirements will be different (significantly less onerous) from that which a large NFP must do to satisfy the requirements.

As stated above some FRSA member organisations are companies limited by guarantee and currently under structures administered by federal legislation, while other regulatory structures reside with the states and territories, such as incorporated associations and charitable trusts or religious organisations. It is not clear from the paper or the enabling legislation how those state-based structures with Federal Government contracts will interact with the ACNC and/or manage any additional requirements until 'harmonisation' across jurisdictions is achieved.



While the consultation paper indicates Government will not expect entities that have to change existing governance procedures to change them overnight and that appropriate transitional arrangements will be in place where it is necessary for an entity to make changes, the enabling legislation does not reinforce this or make the process clear.

While it is envisaged that any governance requirements under Commonwealth powers will be replaced with new uniform governance requirements, and not be in addition to existing governance requirements, clearly there will be a period where increased reporting will be required for many NFP's.

Indications that the Federal Government 'hopes' to work with the states and territories to ensure that the ACNC will be a national regulator, and be responsible for monitoring and administering all governance requirements is far from reassuring.

Government has acknowledged that while the aim is not to impose additional requirements on top of any existing requirements, the process of negotiation with the states and territories in aligning requirements will take time. The complexities are many and the potential for significant duplication during a long transitional period will have a potentially negative impact on support for the process across the sector.

FRSA is prepared to work with Government and the ACNC to facilitate timely communication of education and process information including progress reports and revised timeframes. However, the Government's commitment to proceeding with these reforms in a manner consistent with the National Compact will be a key element in the success of the reform agenda.



Timeframe & Scope of Enabling Legislation

In mid December 2011 Government sought the sector's views about governance requirements for NFPs that will be a core part of the ACNC legislation. On such a critical item of legislation, FRSA believes good governance and due diligence require us to ensure that all governors of our member organisations should have been consulted about the legislative proposals. These representatives have overall responsibility for NFP governance and the timeframe for consultation was insufficient effectively excluding many of their voices.

This timeframe is in direct contradiction to the National Compact commitment made by Government to the Sector about such significant change. As a consequence the Government will not receive the necessary minimum advice from those who govern many NFP organisations. FRSA is also concerned about the Government's decision not to develop a regulatory impact statement as is usually required in such circumstances.

In terms of content, FRSA shares a range of concerns with other NFPs including ACOSS and the University of Melbourne Law School.

The exposure draft proceeds from an assumption that it should be as expansive and comprehensive as possible, capturing the full extent of the powers that the ACNC is expected to have over all not-for-profit organisations when fully operational. As a result the legislation is unnecessarily heavy-handed with a focus on compliance, when the intention is for a light-touch, principles-based approach to regulation.

As a piece of enabling legislation, the exposure draft needs to provide at minimum for the far smaller range of powers and functions that will be required for the ACNC's commencement. The legislation must strike a balance between ensuring the ACNC has the full extent of powers necessary to carry out its intended functions while also supporting the intended 'light-touch' regulation by examples of best practice and support to adopt them, rather than punitive compliance approaches. Key examples which demonstrate unnecessary measures and a failure to develop a legislative model that is fit for purpose include:

- I. The failure to recognise the operating reality for many charities and NFP's, leading to unnecessarily strict grounds for revocation (on the basis of insolvency); the prohibition to register organisations that have previously registered; and the automatic winding up of organisations if they are de-registered.
- II. The failure of the compliance powers to enable graduated responses and the exercise of the ACNC's discretion.
- III. The *allocated penalty units*, which are out of sync with the requirements that are already in place in other jurisdictions, meaning that there are harsher/lesser penalties depending on where the 'paperwork' is submitted. It is important that the scale of penalty points be aligned across jurisdictions prior to the finalisation of the ACNC Act.

FRSA commends the discussion and recommendations in the submission by the University of Melbourne *Not-for-profit Project*, particularly in terms of how to address the over-reach in the current legislation while establishing the appropriate mechanisms for *enabling* the powers and functions of the ACNC.



Independence of the ACNC

FRSA welcomes the Government's decision to establish an independent national NFP regulator. FRSA also supports the intent of the current governance review to provide centralised and simplified reporting arrangements in order to reduce red tape and minimise compliance burdens for the sector. However, success in this pursuit will require a negotiated approach based on support for the sector's social aims and objectives rather than an imposed regulatory system based on detailed punitive measures for non-compliance while organisations 'come up to speed' with new requirements.

In Treasury's Final Report on the Scoping Study for a National Not-for-Profit Regulator, released on 4 July 2011 (the Final Report) it was concluded that, while a new national NFP regulator would provide the greatest benefits, this required a long process to ensure agreement and cooperation between Australian governments. The Report recommended that in the interim, a Commonwealth-only regulator should be established as a separate statutory office within the ATO, reporting directly to Parliament through the Assistant Treasurer. This was envisaged as being 'quick and cost effective' and would retain the expertise of the ATO, although the Final Report also expected it to have a 'new organisational culture'.

However, FRSA shares the concerns raised in the Melbourne Law School - NFP Project Paper¹ in which the authors assert that

'...the establishment of an interim regulator within the ATO poses significant risks. In our view, the ultimate regulatory goal of facilitating the public benefit delivered by the NFP sector does not fit comfortably within the focus and mandate of the ATO. The ATO's primary goal should be to protect the revenue, which puts it in a position of conflict'.

This criticism also applies to the other main regulator, ASIC, in spite of the suggested institutional benefits identified by the Productivity Commission.² ASIC's predominant focus has been on for-profit and market-oriented behaviour, and Woodward and Marshall's study confirmed that NFPs felt ASIC was inaccessible and focused on for-profit behaviour.³

A very large part of a regulator's success depends upon its relationship with the sector it regulates. The confidence of the sector may well be undermined by the location of the regulator within the ATO, even if it is a temporary measure. There would also doubtless be concern that, if there is not the will now to establish an independent regulator, there will be even less political will once the impetus for reform has vanished.

'We welcome the Final Report's view that the interim regulator should be independent and reflect a "new organisational culture".⁴ In this regard, the Final Report

¹ Regulating the Not-For-Profit Sector July 2011 (p15)

² Productivity Commission, *Contribution of the Not-for-Profit Sector*, above n 8, 148-150.

³ Sue Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-profit Regulation* (Final Research Report, Centre for Corporate Law & Securities Regulation, University of Melbourne, 2004) <<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/index.cfm>>, 3.

⁴ Treasury, *Final Report: Scoping Study for a National Not-for-Profit Regulator*, above n 4, 67.



recommends the regulator should be a separate statutory office which will report directly to Parliament through the Assistant Treasurer. Further, an advisory board is suggested as a way of "help[ing to] ensure independence and an organisational focus on the NFP sector".

The sector has long-championed an independent national regulator. In its definitive discussion of this issue, the Productivity Commission (PC) recommended,

The Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations. While ultimately the Registrar could be an *independent statutory body*, initially it should be established as a statutory body corporate or organ in the Australian Securities and Investment Commission (emphasis added).⁵

When the Government announced the establishment of the Australian Charities and Not-for-profits Commission during the Federal Budget 2011, it endorsed the importance of this independence by committing that, 'a commissioner will be appointed to drive all the changes, who will be fully independent and report directly to Parliament via the Assistant Treasurer.'⁶

Despite this commitment to independence, the Government determined that the ACNC should share 'back office functions' with the Australian Taxation Office (ATO) and not with ASIC. FRSA believes this is regrettable, given the relevance of ASIC's regulatory functions to the establishment of the ACNC.

This is particularly problematic as the perception of many across the sector is of a deeply negative culture at the ATO. It is through this lens that the administration of tax concessions for charities and NFPs has operated, particularly where the ATO is unable to recognise the range and diversity of activities that constitute legitimate charitable purpose.

For this reason, FRSA members concur with the ACOSS assessment that if the regulator is to be situated within the ATO a significant amount of caution must be exercised about how any shared functions would proceed. While the pragmatic reasoning for seeking to leverage existing infrastructure while establishing the ACNC is understood, the mechanism for this relationship must serve the Commission's independence.

It is concerning that nothing in the exposure draft sets out how the independence of the regulator will be asserted or maintained through the ACNC enabling legislation. While this is of particular concern regarding its relationship with the ATO, it is equally relevant for the Commission's relationship with other agencies such as existing regulators.

Of even greater concern, are the elements of the exposure draft that indicate a clear lack of independence in core areas such as staffing, as evidenced by the following clause in section 163-5: 'The staff assisting the Commissioner are to be persons engaged under the *Public Service Act 1999* and made available for the purpose by the Commissioner of Taxation.'

⁵ Productivity Commission (2010) *Contribution of the Not-for-profit sector*, Recommendation 6.5.

⁶ 'Making it easier for charities to help those who need it', joint media release from the Assistant Treasurer and the Minister for Human Services and Social Inclusion, 10 May 2011.



This implies that the Commission will not have sole authority over the recruitment and allocation of its staffing, which would be an unacceptable incursion on its independence. As the Productivity Commission recommended, the statutory independence of the ACNC is critical to its success and to the sector's support for it. The independence of the Commission must be clearly and specifically set out in both its enabling legislation and in any other arrangements that govern its operation.

Key principles necessary to ensure the ACNC's independence include:

- An independent statutory framework establishing the ACNC's existence and function.
- A dedicated Commissioner appointed to oversee the ACNC. The Commissioner should be appointed by the Executive, not by the public service, maintaining their independence from existing and alternative structures. The legitimacy of this appointment will be strengthened by an open recruitment through advertising.
- An independent advisory body, appointed by the Executive to provide input on sector specific issues. The Productivity Commission recommended that this body be 'drawn from the sector' and 'support cultural change' within other institutions such as the ATO.
- A direct line of reporting to Parliament, not to a particular Minister. (This does not preclude portfolio responsibilities sitting within a Ministerial office.)
- Adequate funding through the administration of its own Budget, independent of bureaucratic and alternative institutional structures.



Prescriptive tenor of the governance arrangements

Again, in respect of the tenor and nature of the proposed governance arrangements FRSA shares the concerns of our diverse members and ACOSS. The exposure draft and governance arrangements consultation paper are based on the assumption that regulation of governance by the ACNC will be best achieved by pursuing a singular, prescriptive model of governance. The structure clearly favoured by the draft and consultation paper is that of a company limited by guarantee. Yet as outlined in the *Final Report on the Scoping Study for a National Not-For-Profit Regulator*, 'organisational governance rules should be proportional to the size of the entities, risk factors and receipt of public and government assistance'.

As articulated in the University Of Melbourne Law School Paper⁷

'...Identifying the correct goals for regulation is fundamental to the design and effectiveness of any regulatory regime. Several reports have helpfully considered the question of the goals of regulating the NFP sector and it has also been considered in some detail by Jonathon Garton.⁸ Yet too often these regulatory goals are commonly put in terms of generic regulatory principles, or draw too heavily upon theory derived from the regulation of markets. The framework for understanding regulatory goals that is proposed here integrates the insights of earlier scholars to provide a deeper and more contextually based understanding of the appropriate regulatory goals for a national NFP regulator'.

Understood in its broadest sense, regulation seeks to change or channel behaviour in desirable ways. It is therefore critically important to understand the characteristics of the behaviour that is sought to be regulated, as well as to identify the desirable behaviour that is not presently being achieved. The first and most important lesson of regulatory theory is the significance of *regulatory context*.

The Consultation Paper usefully sets out some of the distinctive aspects of the regulatory context of the NFP sector, including:

- The focus of organisations on achieving a community, altruistic or philanthropic purpose (the mission orientation of NFPs);
- The provision of what are commonly termed in economics 'public goods' or 'quasi public goods' which cannot be efficiently provided by the market;
- The diversity of the sector, including in size and activity;
- The foundational role of the sector in enabling an active civil society;
- The growth of the NFP sector in part due to government contracting for delivery of government services; and
- The contribution to community wellbeing.

⁷ Regulating the Not-For-Profit Sector (July 2011) p3-4.

⁸ Spindler, *Improving Not-For-Profit Law and Regulation: Options Paper*, above n 10; Parker, *Self-Regulation and the Not-for-Profit Sector*, above n 10; Jonathon Garton, *The Regulation of Organised Civil Society* (Hart Publishing, 2009).



There are, however, other distinctive aspects of the regulatory context which deserve mention, including:

- The mission and public benefit focus of the NFP sector means that NFPs' interests are often closely aligned with both their members and their decision makers;⁹
- The autonomy of the sector;¹⁰ and
- The fact that, because the activity is not conducted for profit, but is conducted altruistically and often on a voluntary basis, the sector is more vulnerable to regulatory burdens than in a sector where private self-interest remains a strong offsetting impulse.

These features suggest that the sector should not be heavily regulated. It is also important to recognise that different parts of the sector may already be subject to forms of self-regulation. The public-spirited and mission-oriented nature of the sector, in large part, channels behaviour in desirable ways. NFPs are partly regulated through their accountability to their clients, members, and funders (including government). The sector is highly vulnerable to regulatory burdens. Importantly, the desirable nature of the autonomy of the sector and its foundational role in civil society should result in governments giving organisations wide latitude in the performance of their missions.

As stated in the introduction our members and indeed the Charitable and Not-for-Profit sector in Australia is a vibrant, diverse and generally well-governed sector. It is inappropriate and unacceptable that the regulatory functions relating to governance should presume a single model that best suits all charities and NFPs.

The function of governance regulation should be informed by the input and experience of the likes of the University of Melbourne Law School (as above) and extensive work already undertaken by the sector itself. This work has led to the development of best practice models and innovative ways of educating sector organisations on these practices. At the same time we note, while model rules are generally perceived as helpful across the sector, their impact can vary significantly, for example from organisations that have worked extensively on their governance processes to new organisations just starting out.¹¹

A set of core principles, applied through a non-onerous approach supported by minimum legislative requirements – as currently applicable to ASX listed companies - provides for a robust framework for establishing a governance model for the not-for-profit sector. The principles developed by the Charities Commission of England and Wales, similar to the Corporate Governance Principles developed by ASX, provide a high level framework adaptable to support local not-for-profit governance. If the Government and the ACNC proceed with developing such high level principles, further consultation should be undertaken to determine which principles should be in place to enable the current mix of not-for-profits to continue working in the community.

⁹ Pascoe, *Regulating the Not-for-Profit Sector*, above n 10, 17.

¹⁰ Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (February 1999) <http://www.ecgi.org/codes/documents/broadbent_report_1999_en.pdf>, 9-10.

¹¹ If, as discussed in the consultation paper, Victoria is to be used as an example of model rules on governance, it is important to be mindful that Victoria is currently reviewing the *Associations Incorporated Act* and the model rules may change as a result.



We note the current ASX principles and recommendations are 'not prescriptions, they are guidelines, designed to produce an outcome that is effective.'¹² Also, 'nothing in the Principles and Recommendations precludes a company from following an alternative practice... provided it explains the approach.'¹³ There would be little benefit in subjecting the diverse range of NFP entities in Australia to more onerous requirements than those required for the large companies listed on the Australian Stock Exchange.

However, the questions in the governance arrangements consultation paper suggest Government is considering the possibility of subjecting NFPs to more burdensome governance requirements than that currently expected of the sector or 'for-profit' companies. This suggestion is apparent in question 5 which seeks opinion on whether responsible individuals should be required to hold particular qualifications or have prescribed experience. Currently, individuals holding specific roles with ASX listed companies, companies limited by guarantee and incorporated associations must at a minimum be adults, and not be precluded from holding such a role by the courts, or other impairment (such as bankruptcy). The not-for-profit sector is wide and diverse, and requiring responsible individuals to hold particular qualifications may well exclude a significant proportion of the population from being involved in the governance of such organisations. At a time when the Government is encouraging diversity in decision making for for-profit entities, we do not support such an imposition on the sector.

We are in full support of the need for responsible individuals to be undertaking their governance duties in the best interest of the organisation. Current changes proposed to the *Victorian Associations Incorporation Act 1981* look to codify such duties in legislation. As outlined by PilchConnect there is benefit of codification of already accepted common law principles.

PilchConnect supports the introduction of a duty to pursue the purpose of the incorporated association, and the inclusion of duties of care and diligence, good faith and proper purpose, and the duty to prevent insolvent trading. It is generally accepted that these duties already apply to Committees of Management members of incorporated associations by virtue of the common law. PilchConnect provide governance training to incorporated associations based on this approach. However, the codification of the duties in the Act will remove all doubt.¹⁴

Questions 16-19 are further examples of planned increased burden. The questions seek input on the level of insurance and risk management procedures for NFPs. Again FRSA contends that the requirements for risk management and insurances should not be more onerous than those articulated in the governance principles of the Australian Stock Exchange. As outlined by the ASX, 'Each company will need to determine the "material business risks" it faces.'¹⁵ It is accepted that governments and philanthropic donors may require agencies they work with to have certain levels of insurance in place and to meet certain service delivery standards.

¹² ASX Corporate Governance Council *Corporate Governance Principles and recommendations with 2010 Amendments (2nd Edition)* p. 5

¹³ ASX Corporate Governance Council *Corporate Governance Principles and recommendations with 2010 Amendments (2nd Edition)* p.6

¹⁴ PilchConnect *Submission to Consumer Affairs Victoria on the Associations Incorporation Amendment Bill 2010* p.7

¹⁵ ASX Corporate Governance Council *Corporate Governance Principles and recommendations with 2010 Amendments (2nd Edition)* p.33



However this should remain an issue for the funder and organisations, and not regulated for all NFPs through the ACNC. For example, we acknowledge that some level of insurance is highly recommended, in particular public liability and indemnity insurance for governing Boards. However we do not accept that this is an area to which mandatory requirements should be attached, particularly not through the ACNC's enabling legislation. Setting standards around risk management falls appropriately within the function of a principles-led regulator, working in consultation with the sector itself.

It would appear that the governance arrangements discussion paper confuses the role of governance requirements. Our member boards see governance as the structures and processes by which an organisation sets goals, monitors performance, maintains viability and ensures compliance with legal requirements and ethical standards. Organisations should be able to operate in the way that best suits their values, members and/or clients while meeting basic requirements. If they then wish to deliver certain services and/or enter into contractual relations with government or other bodies, the requirements of such obligations, such as insurance, investment strategies, and internal review processes, should be established in response.

The role of the ACNC, as already carried out by Registrars-General and ASIC, should be oversight and good-practice guidance for the establishment and governance maintenance of NFPs. Much work has already been undertaken to provide significant support and resources to develop good-practice governance procedures for NFPs. Further, existing standards such as the Good Governance Principles (AS 800-2003) have been established as part of quality accreditation requirements and it is important that these are incorporated within ACNC's governance standards. This is neither mentioned in the governance arrangements paper nor foreshadowed in the exposure legislation.



Lack of clarity in the legislation regarding interim arrangements

One of the drivers of the sector's support for the establishment of the ACNC has been the intention to reduce the bureaucratic red tape and duplication, ineffective and the overly burdensome regulation organisations currently face. We roundly support support the National Roundtable of Nonprofit Organisations' key objective being *not necessarily less but better regulation of the sector*. We understand that the initial establishment of the ACNC will not necessarily lead to reduced duplication in the first instance but rather add to the regulatory burden as other regulatory bodies await the process of nationalising regulation, particularly in the states and territories. An adequate transition/harmonisation timeline needs to be developed and communicated and it is vital that this includes transitional provisions.

For many of our members that are regulated by their own states and territories (such as Incorporated Associations or co-operatives), who are also receiving tax concessions there is no clarity regarding whether they are subject to registration by the ACNC. The default position should not be that these organisations lose their tax concessions if they do not become registered. All three tiers of Government need to provide clarity or there will be a significant duplication of the regulatory burden for many organisations.

Fuelling this concern is the lack of a binding commitment from states and territories to hand over regulatory powers to the ACNC and fears that the 'transition' period through this phase could be long and arduous. Further clarity about the process and timeframes including in cross-jurisdictional agreement will go some way to reassuring organisations.

Members also seek to ensure in both the short and longer term that the burden of unnecessary and ineffective reporting or acquittal requirements will be reduced through the establishment of the ACNC. This is essential, given the increase in obligations to other organisations such as funders and to members; and in the context of program standards and accreditation procedures.



Additional Concerns & Considerations

The widely recognised value of the sector socially and economically, and the support for the regulator as a mechanism to assist the sector further, are clearly absent in the tenor of the legislation as drafted. The 'Objects' illustrates this best, as they contain a tension between the objectives of maintaining and improving 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.

While the preservation of public trust and confidence in the charity and NFP sectors is an important policy objective, the current drafting does not recognise the history of advocacy for the regulator *by the sector* in the interests of supporting and promoting the sector's performance. The fact sheets that have been developed alongside the exposure draft detail the education and support to the sector that will be the largest functions of the ACNC, yet this is not referred to in the exposure draft and the legislation provides no guarantee that this will be the case. Unless these functions are made explicit in the purpose and principles of the Act, our members may see the ACNC as simply a punitive mechanism for compliance.

The Object of the exposure draft in Section 2.5 is defined narrowly in the following way:

The object of this Act is to promote public trust and confidence in not-for-profit entities that provide public benefits.

We recognise that the matter of public confidence is central to the Commission's purpose; although not the priority matter that our members have expressed their support for the Commission. We are concerned at the narrow way in which this object is conceived and the implication that the way the sector currently conducts itself is not worthy of the public's trust and confidence.

The exposure draft sets out the following to further its object:

- (i) promote the good governance, accountability (to donors, to governments and to the public generally) and transparency of such entities (including through the provision of educational information to them and the provision of information to the public about them);
 - (ii) minimise regulatory duplication and simplify such entities' interactions with governments; and
- (b) this Act establishes a process for registering and regulating such entities.

As important as good governance is for accountability to funders and the public generally, it is equally important to the interests of the clients our members serve. For example, in family and relationship services, these are the clients and communities in which services are operating. The promotion of good governance and accountability should be in the interests of the clients or beneficiaries or users of charities and NFPs, as much as the funders and public generally.



Conclusion

FRSA member organisations are NFPs that are vibrant, diverse, innovative and resourceful. They are organisations focused on a mission to achieve social change through the provision of a broad range of family and relationship support services to the Australian community. The Productivity Commission indicated these organisations provide a wide range of community benefits including 'spillover benefits' that Governments are simply unable to derive.

It is these 'spillover benefits' that create enormous good will and support Australians to improve their lives. NFPs achieve this in the face of significant regulatory duplication and disproportionate reporting requirements. FRSA concurs with ACOSS¹⁶ and the Non-profit Roundtable¹⁷ on the desirability of a new regulatory framework for the majority of Not for Profit organisations, which encompasses corporate and taxation regulation for each of a number of different types and sizes of organisations such as the model of the UK Charities Commission.

The Nonprofit Roundtable has clearly articulated the merits of regulation that is proportional to the size and impact of organisations. FRSA agrees that regulation should be less onerous for those organisations which have relatively small levels of financial turnover and have limited impact on the community, including those that are project or interest based.

The use of 'light touch' regulation in these circumstances is important to encourage individuals and communities to form new organisations that contribute to civil society and democracy. The most important accountability for smaller organisations is to members and donors that support them. More substantial regulatory requirements can apply to larger organisations which receive public funds to provide services or essential supports to community or population groups.

FRSA believes the NFP sector has the capacity and determination to work with Government and the ACNC to ensure that streamlined and transparent governance structures and a 'report once-use often' reporting regime is able to be achieved in the interests of all stakeholders. While ever due process is followed in the establishment and ongoing implementation of these new reforms, along the lines of the National Compact, the Australian community can be confident that the services provided by NFP community service organisations will be better supported to be effective and transparent.

¹⁶ ACOSS Submission to Senate Committee Inquiry into Disclosure Regulations for Charitable Organisations (2008).

¹⁷ Articulated in the National Nonprofit Roundtable Submission to the Victorian Government Review of Not-For-Profit Regulation (2007).



References

University of Melbourne School of Law (Not-For-Profit Project) Regulating the Not-For-Profit Sector July 2011 – Joyce Chia, Matthew Harding, Ann O'Connell & Miranda Stewart

Sue Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-profit Regulation* (Final Research Report, Centre for Corporate Law & Securities Regulation, University of Melbourne, 2004) <<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/index.cfm>>

Treasury, *Final Report: Scoping Study for a National Not-for-Profit Regulator – April 2011*

Productivity Commission (2010) *Contribution of the Not-for-profit sector*,

'Making it easier for charities to help those who need it', joint media release from the Assistant Treasurer and the Minister for Human Services and Social Inclusion, 10 May 2011.

Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (February 1999) <http://www.ecgi.org/codes/documents/broadbent_report_1999_en.pdf>, 9-10.

ASX Corporate Governance Council *Corporate Governance Principles and recommendations with 2010 Amendments*

ACOSS Submission to Senate Committee Inquiry into Disclosure Regulations for Charitable Organisations (2008).

Articulated in the National Nonprofit Roundtable Submission to the Victorian Government Review of Not-For-Profit Regulation (2007).

Woodward, Susan and Marshall, Shelley D., *A Better Framework: Reforming Not-for-Profit Regulation* (2003). U of Melbourne, Public Law Research Paper No. 70; Centre for Corporate Law and Securities Regulation Working Paper. Available at SSRN: <http://ssrn.com/abstract=528443>