

## **RESPONSE TO EXPOSURE DRAFT:**

### **AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012**

#### **Introduction**

Oxfam Australia is an International not for profit organisation which has been operating in Australia since 1953. Oxfam Australia is a Company Limited by Guarantee, endorsed as a Charity and Public Benevolent Institution. Oxfam Australia has operated an Overseas Aid Fund since 1981 as part of the Overseas Aid Gift Deduction Scheme (OAGDS), which enables donations to our overseas aid activities to be tax deductible.

Oxfam is supportive of Government introducing new statutory mechanisms to regulate the NFP sector. This regulation should meet the goals previously stated by Government of providing; “a foundation for a strong and sustainable Not for Profit (NFP) sector to achieve these altruistic goals and deliver important benefits to the community”.<sup>1</sup>

In summary Oxfam has the following priority concerns in relation to the exposure draft:

- The legislation is not in keeping with the announced intentions and objectives of the Australian Charities and Not-for-profits Commission (ACNC);
- The implications for changes to the OAGDS are unclear;
- References in the draft to the “in-Australia” test are misleading when there is currently no clarity around these provisions. This lack of clarity puts the ongoing operation of Australian INGO’s in an untenable position;
- The scope of powers of the Commissioner are excessive and lack clear criteria for application and execution;
- The ACNC will not meet the stated objective of simplifying the regulatory environment unless there are parallel changes in the legislation of all states;
- The reporting regime of the ACNC will add to the administrative burden on NFPs;
- The categorisation of organisation is too simplistic with revenue levels set too low for the attendant reporting requirements;
- The phasing of the implementation of the ACNC needs to be captured more explicitly in the legislation;
- The distinction between charities and NFPs is excessively complicated and potentially onerous for organisations;
- The implications for Companies Limited by Guarantee is as yet unclear; and
- The introduction is too rushed to allow effective consideration of all aspects of the proposed legislation by affected organisations and the sector as a whole.

Our detailed comments on the Exposure draft follow.

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<sup>1</sup> Final Report: Scoping Study for a National Not-for Profit Regulator April 2011

## **The Objective versus the Legislation**

Oxfam supports the creation of a national regulator and the reform of charity law based on the ideals of:

- reducing red tape for the sector;
- harmonising regulations across all government bodies; and
- raising the standards, where necessary, through education and support services and through the creation of a regulator which could work with the sector to achieve these objectives.

Such a move by Government is in-line with the aspirations and priorities for action committed to in the *National Compact: working together*.

The positive and co-accountable commitments made in the *National Compact*, are reiterated in both the Object of the draft bill and throughout the Explanatory Materials. Oxfam does not see a clear correlation between these commitments and the exceptional level of powers vested in the ACNC and the Commissioner in the exposure draft.

The object of the draft bill is “to promote public trust and confidence in not-for-profit entities that provide public benefits”. The detail of the bill and the powers vested in the ACNC and the Commissioner appear contrary to both this objective and Government’s previous assertion that Government and Sector organisations will work together in new ways based on partnership and respect<sup>2</sup>.

This Exposure Draft, and the associated Explanatory Materials go well beyond these high level and aspirational objectives, and in real terms run the risk of increasing the compliance burden on Australian Not-for-Profits. The ACNC would be invested with powers which exceed the original rationale. In some cases, such as those outlined in Chapter 5 of the Explanatory Materials, the powers of Compliance and Enforcement are more akin to that of a law enforcement body.

The creation of a national regulator should be based on the assumption that for the most part not-for-profit entities in Australia operate transparently, responsibly and are accountable to their stakeholders, including the various regulatory bodies. With this Bill Government could be perceived as reacting to the need to impose compliance on a sector which is inherently non-compliant with current regulatory requirements.

### **Implications for the OAGDS and Restatement of the “In-Australia” Test**

The Exposure Draft does not refer to the OAGDS which is a substantial part of the Deductible Gift Recipient (DGR) regime, with over one million donors and over one billion dollars of donations covered under the regime. OAGDS compliant agencies are partly

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<sup>2</sup> National Compact 2010 Page ii

exempt from the in-Australia requirement for DGR that requires the funds to be for the 'broad benefit of the Australian community' as their funds are sent to developing countries for the relief of poverty under AusAID guidelines.

A move to revert to the full "in Australia" test as the current Exposure Draft seems to suggest will put Australian NGOs working in international development back to the pre 1981 situation, where donations for international development were not tax deductible. This would be detrimental to our supporters and the poor communities with whom our programs are working. Government needs to clarify its intention with respect to the OAGDS deductible gift regime. Considering Australia's commitment to increase spend on international aid, Government must include reference to maintaining the OAGDS and release a revised draft at the earliest opportunity to enable further public input. This is crucial for organisations that facilitate the accountable and effective distribution of both Government funds and those donated by individual members of the public.

The inclusion of reference to the restatement of the "in-Australia" test has raised a number of issues that are of concern to Oxfam:

- The exposure draft Explanatory Materials reads as though written under the assumption that the previously released *Exposure Draft: Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No. 1) 2011: tax exempt body "in Australia" requirements* is passed and enacted unimpeded. This bill in its original form risked negatively impacting the operation of most, if not all, Australian INGO's. Oxfam understands that Government is redrafting this Bill in consultation with sector experts in association with the Australian Council for International Development, however until the revised version is released Oxfam can only assume that Government's intentions regarding re-stating the "in-Australia" provisions remain unchanged.
- The Explanatory Materials state that the objective of the "in-Australia" legislation is "to ensure that Parliament retains the ability to fully scrutinise those organisations seeking to pass money to overseas charities and other entities in order to address possible abuse of NFP entities for the purposes of money laundering and terrorist financing."<sup>3</sup> This appears to be a duplication of control under statute as the protection of Australian interests and the control of Government as it relates to money laundering and terrorist financing is addressed through the *Anti Money Laundering and Counter Terrorism Financing Act 2006 (Cth)* and the Criminal Code. It is worth noting that under the current OAGDS regime the Treasurer has discretion to approve (or reject) agencies that may or may not be fully compliant with OAGDS criteria. For reasons of transparency it is important that the legislation remove these discretionary powers and formalise the OAGDS as an exemption to the in-Australia test with regard to destination of the gift.
- The inclusion of Clause 1.13 of the Explanatory Materials introduces criteria for the definition of a NFP which are derived from the "in-Australia" Exposure Draft, and is

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<sup>3</sup> Exposure Draft: Australian Charities and Not-for-profits Commission Bill 2012 Explanatory Materials p10

contrary to the 'destination of income' test introduced into charity law by the Australian High Court decision in *Word Investments*<sup>4</sup> and the current OAGDS guidelines.

Any reference to the restatement of the "in-Australia" test should be removed until such time as there is greater clarity around the subject, and the revised Amendment Bill is passed.

### **Scope of Powers of the Commissioner**

The scope of powers of the Commissioner are extremely broad and in many cases lack clear criteria which would give guidance to both the Charities/NFP's subject to this legislation, and the Commissioner when executing these powers.

As an example, the revocation of registration in the event that an entity becomes insolvent, or likely to become insolvent under this Bill has the result of automatic revocation of the registration. The revocation of registration in such a circumstance is short sighted and disregards the possibility that an appointed administrator may determine that the entity can continue operations. The revocation of registration in the event of insolvency guarantees that the entity will be wound up as the absence of registration will severely impact the entity's ability to generate revenue through tax deductible gifts (if a DGR) or other streams of grant funding which require registration as a criteria of eligibility. The inclusion of automatic revocation in such a circumstance would put the charitable assets into greater jeopardy.

The Commissioner being able to issue directions to advance the purpose of the entity is too broad in application and narrow in result. The consequence of this could be that in the event that an entity expands its services beyond the confines of its registration the Commissioner could direct it to cease the activity and return to its original operational focus. Charities and NFP's in Australia are innovative, and go to great lengths to meet the needs of their community. This inflexible solution should be removed and, where necessary, the Commissioner should assist the entity to review and amend its registration.

The Bill remains silent in the event of voluntary deregistration. Oxfam assumes that deregistration for any reason would result in the entity winding up. However if an entity decides to continue operation but no longer as a charity or NFP, thus not receiving any taxation benefits it should be entitled to do so without negative recourse from the ACNC. The subject of voluntary deregistration and the consequence of such an action needs to be included in this Bill.

A primary objective of the ACNC is provision of education and support to the sector, resulting in stronger skills and expertise of practitioners, and the ongoing trust and

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<sup>4</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204

confidence of the public. The overbearing and prescriptive powers of the Commissioner do not foster the achievement of such an objective.

### **Simplification of the regulatory environment**

This intention of Government in creating the ACNC is to reduce red tape, duplication and compliance costs for the sector. This cannot be achieved while there continues to be separate regulatory regimes at State and Territory levels and for State and Territory legislative purposes. If the objective of a “truly national one stop shop” is to be achieved, the implementation of the ACNC should not proceed until there is agreement between Commonwealth and the States/Territories to ensure the ACNC will be the single regulatory body for all law purposes nationally.

Government by waiting until such time as that agreement has been reached would shore up the constitutional basis for the ACNC legislation. Currently this appears to be compromised by having to rely on a patch-work of constitutional powers. Without this harmony, the ACNC is simply another regulator which results in increased costs and administrative obligations for Australian NFPs and a distraction from core purposes.

A national entity such as Oxfam, which is registered in all states for the purposes of fundraising will not derive any administrative benefit from the introduction of the ACNC until such harmony exists. This administrative burden extends beyond that of the differing state based annual reporting, notifications, registration and licensing requirements to include a variety of operational matters related to approaching the public for donations.

### **“Report once use often”**

The concept of report once, use often is one which Oxfam fully supports. Under the proposed model however there is little evidence of how any administrative benefit would be derived from the submission of an *Annual Information Statement for a charitable entity*. Additional administrative input would be required to replicate information that exists in the submitted audited accounts and produced Annual Report.

In the absence of harmonised legislation and the ACNC adopting the regulation of Companies Limited by Guarantee the current proposition equates to an additional compliance requirement. Should the ACNC enter into negotiations with large Government donors such as AusAID to create a form that would facilitate the acquittal of grant funding and harmonise State/Territory legislations a benefit may then be recognised.

### **Categorisation of organisations and the reporting criteria**

The bill provides for three tiers of organisation (small, medium and large) dependent on revenue level and with different reporting requirements. These classifications are set too low and do not take into consideration program spend, staffing levels, or whether staff are volunteer or paid. The financial and administrative burden and expense on an enterprise

which has a revenue of \$260,000 (tier 2) and only one paid staff member would impact the amount that NFP could use to further its objects.

Oxfam recommends that Government increase the revenue levels of each category and introduce a classification such as that employed by ASIC which takes into account both revenue and employee size at the end of the reporting period

### **Focus of ACNC and distinction between Charities and Not for Profits**

Government has stated that the ACNC will concentrate its efforts at commencement on new charities, including public benevolent institutions. In the long term, the ACNC's role will expand to cover the registration and regulation of all NFPs receiving Government exemptions, concessions and benefits.<sup>5</sup> Oxfam is supportive of such an incremental approach to the ACNC's operation; however such an intention is not clearly reflected in the draft Bill and Explanatory Materials. To support such an approach Oxfam would suggest the re-drafting of the Bill and Explanatory Materials to clearly communicate such an approach particularly around the sections which address NFPs specifically.

In addition to the above Oxfam would recommend that the table in clause 5-10 be simplified, with the current broad number of categories and sub-categories being seen as excessively granular. The implication of this is that it will cause unnecessary administrative complexity and confusion. We recognise that this table now includes additional sub-types which have been recognised as charitable by the common law. However the disparity between this table and that in s 50.5 of the *Income Tax Assessment Act 1997 (Cth)* may mislead new entities when registering, or existing entities when transitioning. Many, if not most charities will qualify for registration in several "subtypes", particularly for entities with a diverse purpose. An inadvertent failure to register in a particular subtype will have the consequence of excluding the entity from funding from the Commonwealth in a particular stream.

It is of concern to Oxfam that the "Advancement of social and community welfare (including the prevention of poverty)" is a subtype of the Charitable purpose entity, however the relief of poverty is not included. Oxfam recommends that the "relief of poverty" and reference to international aid be included in the redraft of the table in clause 5-10.

### **Companies Limited by Guarantee**

Oxfam Australia is a Company Limited by Guarantee, and like the other 11,000 such entities in the sector has compliance and reporting requirements to ASIC. It would be reasonable for a Company Limited by Guarantee to expect that the introduction of the ACNC would not increase the current level of regulatory or compliance obligation. In the absence of Government releasing the Companies Limited by Guarantee discussion paper we are unable

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<sup>5</sup> Treasury's not-for-profit reform factsheet – the ACNC Exposure Draft 'One-Stop Shop'

to critically review the proposition of Government that the regulation of such entities will be moved from ASIC, nor how compliance obligations to the Corporations Act 2001 (Cth) currently regulated by ASIC, will be effectively regulated by the ACNC.

### **The timeline of reform**

Since May 2010 the not-for-profit sector has seen no less than seven papers/draft bills released by Government for consultation. These have addressed a variety of reforms for the sector, with this bill being the latest.

Oxfam would suggest to Government that a more realistic timeframe be adopted in the creation of the ACNC. This would ensure that the legislation which will provide the framework for uniform regulation nationally is in place prior to the ACNC commencing operation. This delay would also allow the ACNC to develop the information and educational tools required of its remit. It will also provide the sector with more time to fully understand the changes introduced by Government.

This new timeframe would give both Government and the sector the time to review the multitude of documents that have been, are currently, or are yet to be released for consultation and ensure that any contradictory requirements are identified and addressed prior to compliance being required by the sector.

### **Conclusion**

Oxfam is supportive of Government introducing a national regulator as a mechanism to simplify what is currently an extremely complex web of compliance requirements. The introduction of the ACNC needs to be done in line with the agreed goals of NFP reform.<sup>6</sup>

In summary Oxfam makes the following recommendations:

1. That Government review the tone and resulting powers of the ACNC and the Commissioner to reflect the objects of the Bill and the agreements made between Government and the sector in 2010.
2. That the current OAGDS regime be maintained as it has worked well for the past 20 years and has provided an important channel for ordinary Australians to support the relief of poverty in developing countries.
3. That reference to the restatement of the “in-Australia” test from the *Exposure Draft: Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No. 1) 2011: tax exempt body “in Australia” requirements* still in redraft be removed until such time as there is greater clarity around the subject and the revised Bill is passed.
4. Government review and reconsider the broad scope of powers of the Commissioner and both reduce the scope of these and introduce clear criteria around their application.

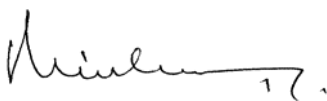
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<sup>6</sup> Final Report, Scoping Study for a National Not-for-Profit Regulator, p13

5. Government reconsider the automatic revocation of registration upon any registered entity becoming insolvent or likely to become insolvent considering such an act ensures that the entity will cease to operate.
6. Government reconsider the power of the Commissioner to order a registered entity to reduce the scope of service offerings if these exceed the limits of registration, instead assisting the entity to correct the issues with its registration whilst maintaining the delivery of services.
7. Government revise the Bill to include the subject of voluntary deregistration and the consequence of such a move on the entity.
8. The application of “report once use often” is reviewed to ensure that the current duplication of compliance actions is not exacerbated.
9. Government review the categorisation of organisations and both increase the revenue thresholds of the levels, and consider broadening the criteria to include staff numbers and whether staff are paid or unpaid to ensure that the cost of additional compliance does not materially impact on an entity furthering its objects.
10. Government include the “relief of poverty” and reference to international aid be included in a redraft of the table in clause 5-10.
11. Government redraft the Bill and Explanatory Materials to clearly communicate the phased implementation of the ACNC first focussing on Charities then NFPs.
12. Government simplify the table in Clause 5-10 to reduce the potential confusion to newly registering entities and the unintentional non-compliance of entities as they grow over time to meet the changing needs of the communities they service.
13. Government delay the creation of the ACNC until such time as:
  - a. Agreement is reached between the Commonwealth and the States/Territories to ensure that the ACNC will be the single regulatory body for all law purposes nationally.
  - b. The Companies Limited by Guarantee consultation paper is released and the regulation of Companies Limited by Guarantee and the duplication of administration between the two regulators is understood, and resolved.

**For Oxfam Australia**

27 January 2012



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