



everyone's family

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

Submission to The ACNC Review Panel

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Overview of The Smith Family

The Smith Family is a national charity founded in 1922 by a group of business men to improve the lives of disadvantaged children in Australia. Almost a century on from its founding, it is now the nation's largest children's education charity.

Our vision is a better future for young Australians in need. Our mission is to create opportunities for young Australians in need by providing long-term support for their participation in education. This mission is founded on the belief that every child deserves a chance.

Our mission guides every element of our work, including program development and delivery, research, advocacy and fundraising. The Smith Family delivers programs in each state and territory in Australia, in over 90 communities, including many regional and rural communities.

In 2016-17, The Smith Family supported more than 151,000 children, young people, parents, carers and community professionals through its programs. Over 120,000 children and young people participated in programs run by The Smith Family. This includes almost 39,000 children and young people participating in our largest program, *Learning for Life*.

In 2016-17, The Smith Family's total income was approximately \$100 million. Around 70 percent of this funding comes from private donations from individual supporters, corporate partners, universities, trusts and foundations, and bequests. There are over 230 partnerships helping to sustain our programs. Only a quarter of The Smith Family's income is sourced from different levels of government.

As part of our leadership and collaborative work in the sector, The Smith Family is a member of a number of organisations and represented on a number of advisory groups and boards. This includes being a member of the Community Council for Australia (CCA), with our Chief Executive Officer, Dr Lisa O'Brien, sitting on their board.

Introduction

The Smith Family welcomes the opportunity to contribute to the review of the Australian Charities and Not-for-profit legislation (the Act). Charities operate in a complex regulatory matrix with requirements and obligations at the state, territory and Federal level. As a national charity working in every state and territory, it is important to us that the ACNC, as a one stop shop, can deliver efficiencies in administration and compliance. The review is a timely opportunity to further refine the operation of the ACNC. It is important to The Smith Family that the ACNC continues to embed its role as the chief regulator of the sector.

The value of Australia's charities is by now well documented.¹ As stated by the ACNC, charities make an invaluable contribution to our communities, delivering vital services, engaging volunteer efforts and helping beneficiaries at home and abroad.² The advocacy work undertaken by charities is equally important and impactful in ensuring public policy is developed and delivered in collaboration with civil society.

The Smith Family believes that the ACNC has developed into a credible and well-functioning regulator of the charities sector during the past five years. The regulatory regime set out under the Act is fundamentally sound. It enables the ACNC to effectively carry out its duties. As a result of the existing regime, the charities sector is more transparent and accountable to the public, and charities can operate in a climate of predictability and certainty.

We also believe the review is an opportunity to build upon the existing regime and incrementally improve it. There is no need for wholesale revisions of the ACNC or the Act as this would only re-introduce regulatory uncertainty for minimal gain. A similar point was made by the ACNC Advisory Board in their submission.³

The Smith Family has identified elements of the ACNC's operation that could be strengthened in order to improve its operations, its engagement with the sector, or to reduce administrative burden on the sector.

¹ See for instance, *Economic Contribution of the Australian Charity Sector*, produced by Deloitte Access Economics for the ACNC, November 2017.

² Submission to the Review by the ACNC, p 11, paragraph 1.2

³ Submission to the review by the ACNC Advisory Board, p 1, namely 'With the Act having been embraced by those reliant on the ACNC's regulatory role, and with it enabling scope for the Commonwealth and States and Territories to refer further powers to the ACNC, there may be no need for amendment to the Act. In fact, caution in recommending amendments to the Act may be prudent. Legislative change creates uncertainty, and a subsequent burden of practice change by those impacted by new law. Opening up a well-functioning Act to parliamentary debate may also result in unforeseen legislative outcomes'.

These are as follows:

1. The Scope of the Act;
2. The Objects of the Act;
3. Matters for consideration by the Commissioner under the Act;
4. Harmonisation of reporting requirements;
5. Ensuring quality data in the charities register;
6. Increasing adoption of the charities passport;
7. Improving understanding of Australian Consumer Law;
8. Appointment of the Commissioner;
9. Relationship between the Commissioner and the Advisory Board;
10. Protecting charities advocacy work; and
11. Developing institutional memory within the ACNC.

The Smith Family's position on these items is further outlined below.

1. Scope of the Act

As noted in the ACNC submission, at present charities are the only not-for-profit entities eligible for registration with the ACNC. The ACNC reflects the potential scope of regulatory power prescribed by the Act but not the actual, more limited scope which is only applied in reality to charities.⁴

To register further categories of not-for-profits would be a major task for the ACNC. As the ACNC itself notes, there are 190,000 not-for-profits endorsed by the ATO for tax concessions, of which approximately 54,000 are registered charities.⁵ Given the large number of not-for-profits as yet unregistered, The Smith Family recommends that registration of other not-for-profits should only commence if:

- a. a reasonable, multi-year timeframe for the gradual registration of other NFPs is devised so as to not unreasonably interrupt with the other core functions of the ACNC in regulating the charity sector. This could take place, for instance, over a three-year period; and
- b. the ACNC is adequately resourced to carry out such a major task.

⁴ Submission to the Review by the ACNC, p 17, paragraph 1.45.

⁵ Submission to the Review by the ACNC, p 17, paragraph 1.44.

2. Objects of the Act

The Smith Family believes that the Objects of the Act⁶ are sufficient for the operation of the ACNC. The current objects are the key for an effective functioning charities sector, namely:

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

We note that the ACNC in its submission proposed the addition of two further objects relating to the efficient use of resources by the sector, and enhanced accountability of the sector to donors, beneficiaries and the public.⁷ The intent of these proposed new objects can be subsumed within the existing objects. We therefore believe it is unnecessary to add further objects to the Act.

3. Matters for consideration by the Commissioner under the Act

The Smith Family believes that the matters which the Commissioner must consider in exercising powers and duties could be expanded. This is in order to provide a more fulsome framework within which the Commissioner can engage and regulate the sector and help it thrive over coming years. These additional items are as follows:

- *encouraging charitable giving and voluntary participation.* Given the importance of both these aspects to the growth, sustainability and effectiveness of the charity sector, their inclusion ensures that the Commissioner considers relevant ways to further strengthen public and private engagement with the sector; and
- *encouraging charities to use innovation to further improve service delivery.* Many charities strive to find new, breakthrough innovations to improve service design and delivery, in line with their mission. Incorporating this specific aspect of the work of charities into the Act ensures continuous improvement is a priority for the Commissioner as well. It also reaffirms the Objects of Act being 'to support and sustain

⁶ Section 15-5 of the Act.

⁷ Submission to the Review by the ACNC, p 21, paragraph 2.4.

a[n]...innovative Australian not-for-profit sector'.⁸ In practice, the Commissioner could encourage innovation by facilitating the sharing of good practice. An important topic for instance, is the increased use of digital technology in service delivery and fundraising. Enhanced use of digital technology can increase the scope of and access to services, as well as improve flexibility for service users. The ACNC could identify and collect leading or emerging practice examples for dissemination to the sector as case studies. This would in turn encourage greater, continuous information sharing amongst the sector.

Further, The Smith Family believes that the wording on section 15-10(h) should be amended to more clearly articulate the importance of the charities sector. Currently the wording states that the Commissioner is to have regard to 'the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia'. Whilst this wording highlights the distinctiveness of charities it under-emphasises their importance and vital contribution in helping communities. The Smith Family proposes that (h) could be amended to read, 'the unique nature and diversity of not-for-profit entities and the *vital* contribution that they make in helping Australian communities'. In this way, the legislation can help play an educative role for the public on the role of charities.

4. Harmonisation of reporting requirements

As mentioned, The Smith Family is a national organisation operating in all states and territories. It has significant reporting requirements under various legislation. The introduction of the ACNC has to date led only to a moderate reduction on the red tape costs of The Smith Family. A key benefit for us has been the ongoing efforts to harmonise registration and reporting requirements nationally. This has been restricted so far to South Australia and Tasmania but we understand other negotiations are ongoing.

Harmonisation work is very important to The Smith Family, as it is for other national charities. We strongly encourage this work to continue as a major policy priority. The ACNC remains the suitable entity to lead national harmonisation efforts over time with state and territory counterparts.

A lack of harmonisation currently limits efficiency in The Smith Family's efforts to fundraise, expand services and increase its positive impact for Australian communities. One of the key issues is the need to separately register as a fundraising organisation in all states and the ACT. This makes conventional fundraising activity, such as running a national raffle, an administrative and compliance challenge. Whilst reporting requirements have gradually been reduced there is much more work that can be undertaken by ACNC collaborating with relevant regulatory agencies across the country.

⁸ In particular, Section 15-5 (b).

Ensuring that harmonisation is a priority will not only help national charities to continue to mature, it will help small and medium-sized charities to expand services across state and territory borders.

As both the ACNC and the ACNC Advisory Board acknowledge in their submissions, the ACNC has so far been funded to undertake operations primarily relating to the first object of the Act, that is 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'.⁹ This has limited the capacity of the ACNC to concentrate on red tape reduction. Red tape reduction was a major goal in creating the ACNC and was well supported by The Smith Family and the sector generally. The Smith Family believes it is important for the ACNC to be adequately resourced to undertake all its legislative objectives. Harmonisation efforts will deliver a key benefit to the sector over time, and the ACNC should be commensurately resourced to undertake these activities.

5. Ensuring quality data in the charities register

The Smith Family supports the Community Council for Australia position that more work be done to ensure the ACNC has a higher level of consistency and comparability in the data sets of the Charities Register. This is an important portal for the public to better understand the operations of the sector and make like-for-like comparisons across organisations. Improving the collection and collation of quality data over time should be a priority for the ACNC, and it should be adequately resourced to do such work.

6. Increasing adoption of the charities passport

The Smith Family believes that the creation of the charities passport was a positive step in helping reduce regulatory burden in liaising with government. The ACNC should lead efforts to expand the roll out across government, regulators and major funders of the sector. A wider adoption of the passport will allow charities to fundraise and deliver core services with less administrative process - for instance, reducing the need to obtain letters from the Australian Tax Office setting out their eligibility for taxation concessions as proof of charitable status.

7. Improving understanding of Australian Consumer Law

The ACNC should take a leading role in helping the sector understand its responsibilities and obligations under Australian Consumer Law (ACL). The ACL includes a range of specific obligations in relation to unfair practices, consumer

⁹ Submission to the Review by the ACNC, p 20, paragraph 1.71; Submission by the ACNC Advisory Board to the Review p 1-3.

transactions and safety of products and product-related services.¹⁰ The ACL applies to certain activities of charities, notably fundraising in specific circumstances. It also includes obligations prohibiting misleading or deceptive conduct.

The sector is already required to comply with a complex matrix of legislation at different levels of government. The sector is only beginning to understand the applicability of the ACL.

It should be incumbent on the ACNC to ensure that appropriate information, guidance and advice is collated and disseminated on obligations under the ACL and that all reasonable assistance is available to improve charities' understanding of the subject area.

Improving charities' knowledge of ACL will serve to contribute to public confidence and trust in their operations over time.

8. Appointment of the Commissioner under the Act

The selection of the Commissioner should reflect the independence of the ACNC in regulating charities. The Smith Family recommends that the mechanism for appointing the Commissioner should be clarified to ensure it is a merit-based, publicly transparent and independent selection process. This would only improve public and sector confidence in the regulatory functions of the ACNC.

9. Relationship between the Commissioner and the Advisory Board

The Act could strengthen the value of the Advisory Board and its role in working with the Commissioner. Currently the Advisory Board can only advise the Commissioner at his or her request.¹¹ The Smith Family believes that the Board should be able to proactively raise issues and provide advice to the Commissioner rather than waiting for requests. This will strengthen the relationship between the Advisory Board and the Commissioner and make greater use of the Board's skills, expertise and experiences, in turn helping the Commissioner exercise powers and functions.

Under this amendment, the Commissioner would retain the prerogative of how to respond and act upon the advice, and Section 135(3) makes it clear that the Advisory Board cannot direct the Commissioner in any way.

¹⁰ *A Guide to the Australian Consumer Law: For fundraising and other activities of charities, not-for-profits and fundraisers*, December 2017, developed by federal and state agencies dealing with competition, consumer protection and fair trading, p 2.

¹¹ Section 135-15 (1) of the Act.

10. Protecting charities' advocacy work

The Smith Family recommends that any amendments to the Act, or the operations of the ACNC, ensure that the advocacy work of charities is protected and encouraged as a vital contribution alongside service and program delivery.

Advocacy is a vital and core activity and priority of The Smith Family alongside program delivery. For The Smith Family, prioritising advocacy is critical because we understand that our work on the ground alone is insufficient to achieve our vision.

This is because in Australia, there are 1.1 million children and young people living in poverty and our programs do not reach all of them. Further, the wellbeing of these 1.1 million children and young people is influenced by a range of factors, including government policy, human service design and delivery and prevailing community attitudes, including in the corporate and philanthropic sectors. Our program delivery alone is insufficient to impact on the broader influences that impact on children and young people's wellbeing. It is through advocacy that we seek to influence those broader influences on behalf of, not only those young people who participate in our programs, but for the 1.1 million young Australians living in poverty, thereby improving their broader life chances.

Many other Australian charities also undertake advocacy as part of fulfilling their core purpose. Advocacy is an intrinsic and positive component of the operations of charities. As noted by CCA, of which The Smith Family is a member, any charity pursuing its public purpose can legitimately become an advocate for that purpose.¹²

There is significant community benefit derived from charities' advocacy work. By directly delivering services to the community, charities are uniquely placed to understand the challenges facing Australian communities. Given their charitable purpose, charities can ensure that those on our community's periphery are placed at the centre of major public policy discussions. Australia's communities, and civil society, are in turn better able to flourish when the voices of charities are actively encouraged in the public policy debate.

Further, charities and governments can act as partners in developing high quality public policy that benefits the community. Advocacy helps improve the policy development processes of government. Charities provide government and the public sector with direct community insight on emerging social and economic issues whilst offering constructive reform proposals to better address the associated challenges. The institutional perspective of government combined with the frontline experience of charities can contribute to more effective policies and programs maximising impact and value for the taxpayer.

¹² Submission to the *Foreign Influence Transparency Scheme Bill 2017* by the Community Council for Australia, p 3.

For instance, The Smith Family collects and examines longitudinal quantitative and qualitative data on key educational outcomes. We are able to utilise this data to develop and propose credible, evidence-based public policy on education issues for consideration by federal, state and territory governments. It is critical that the advocacy work of charities is protected and encouraged in any recommendations put forward by the Review Panel.

11. Developing institutional memory within the ACNC

Given the scope of the ACNC's responsibilities under the Act, The Smith Family would recommend that the ACNC is adequately resourced and encouraged to build up internal capability and institutional memory. In the medium to longer term this will make the ACNC a knowledge hub on relevant policy issues, and a more effective regulator. This in turn will help charities in more effectively navigating the regulatory framework as it evolves over time.