AUSTRALIAN COUNCIL FOR INTERNATIONAL DEVELOPMENT

Inquiry into the Australian Charities and Not-for-Profits Commission (ACNC) Bill

31 August 2012

Submission to the Parliamentary Joint Committee on Corporations and Financial Services

Information provided by: Australian Council for International Development

14 Napier Close
Deakin ACT 2600
Phone: +61 2 6285 1816
Fax: +61 2 6285 1720
Contact: Marc Purcell, Executive Director

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Phone: (02) 6277 4587
Fax: (02) 6277 4774
email: corporations.joint@aph.gov.au

Submission to the Parliamentary Joint Committee on Corporations and Financial Services

Re: Inquiry into the Australian Charities and Not-for-Profits Commission (ACNC) Bill

30 August 2012

1. **Introduction**

The Australian Council for International Development (ACFID) unites Australia's non-government aid and international development organisations to strengthen their collective impact against poverty. Our vision is of a world where gross inequality within societies and between nations is reversed and extreme poverty is eradicated.

ACFID's purpose is to provide leadership to the not-for-profit aid and development sector in Australia in achieving this vision and to fairly represent and promote the collective views and interests of our membership.

Founded in 1965, ACFID currently has 86 members operating in more than 100 developing countries. ACFID's membership expends $1.2 billion on humanitarian and development activities and raised $850 million from over 2 million Australian households (2009/10). 86% of funding is from non-government sources. ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community based groups, with a mix of secular and faith based organisations.

The ACFID Code of Conduct is a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations. Covering over 50 principles and 150 obligations, the Code sets good standards for program effectiveness, fundraising, governance and financial reporting. Compliance includes annual reporting and checks. The Code has an independent complaints handling process. Over 120 organisations belong to the ACFID Code and can be viewed at http://www.acfid.asn.au

1.1 This submission comments on the *Australian Charities and Not-for-Profits Commission Bill 2012* (**ACNC Bill**) referred by the House of Representatives to the Parliamentary Joint Committee on Corporations and Financial Services on 23 August 2012.

2. Overview of ACFID's position

2.1 ACFID supports the establishment of a national, independent regulator with its original stated aim toreduce red tape which inhibits the effectiveness of the international aid sector, and the not-for-profit (**NFP**) sector in general.

2.2 ACFID welcomes the amendments made to the ACNC Bill in response to many of its concerns. There are a few outstanding issues however, one specific to the overseas aid and development sector, and three of general application.

2.3 ACFID makes the following recommendations :

<u>Recommendations specific to the Overseas Development Sector</u>:

I. ACFID recommends that the phrase "ensuring" in 50-10(2)(c) should be deleted and "addressing" or "taking all reasonable effort to ensure" be inserted in its place.

II. ACFID recommends that the Explanatory Memorandum note that any external conduct standards introduced in regulations pursuant to Division 50 of the ACNC Bill should not disrupt or discourage legitimate charitable activities, as recommended by the UN Financial Action Task Force.

III. ACFID recommends that Division 50 be amended to allow the Minister to adopt a sector-specific code of conduct in lieu of external conduct standards by:

a. adding, in s.50-10, a sub-section in similar terms to s.45-10(4); and

b. adding commentary in the Explanatory Memorandum, in relation to Division 50 and the external conduct standards, similar to that at paragraphs 5.37 to 5.39.

<u>General Recommendations</u>

IV. ACFID recommends that Part 5-2, Division 110, include a clear statement that the Commissioner is independent of Government and the ATO.

V. ACFID recommends the insertion of the word "solely" in proposed 120-5(2).

VI. ACFID submits that procedural fairness provisions, similar to sections 35-15 and 35-20, be inserted into Divisions 80 and 85 of the ACNC Bill.

VII. ACFID recommends that proposed Subdivision 60-E be amended to:

i. Include safeguards which protect entities when providing information which might be self-incriminating (in similar terms to proposed section 70-25);

ii. Not apply to assessments about taxation compliance (either by the deletion of sub-section 55-10(c) in the definition of

"recognised assessment activity" or by specific exclusion in Subdivision 60-E);

iii. Include a statement that it is subject to Division 70;

iv. Ensure that entities cannot be penalised for failure to provide information about a period when that information was not legally required to be kept at that time.

A. ISSUES AFFECTING THE OVERSEAS DEVELOPMENT SECTOR

3. External conduct standards – Division 50 – empowering sections should reflect current accepted terminology

3.1 One of the concerns that ACFID had in relation to the originally drafted external conduct standards was that it used language imposing much higher burdens on organisations than is currently required by the Australian Government and international agreement. This language was transferred to the empowering provisions in Division 50 of the ACNC Bill – it has partly been rectified but it still remains in one section.

3.2 In particular, the proposed external conduct standards, and the empowering provisions in Division 50, required registered entities to "ensure" certain things in relation to terrorist organisations. This is in contrast to the Australian Attorney-General's Department which states that NGOs should take "all reasonable effort" to ensure the entities they work with do not channel funding to terrorist organisations. The ACFID Code reflects this position. Further, AusAID agreements with NGOs require that "best efforts" are taken in this area.

3.3 The use of the term "ensuring" remains in section 50-10(2)(c). It states that the standards require registered entities to establish processes for the purpose of "<u>ensuring</u> specified matters" (50-10(2)(c)). This will mean that Australian aid and development agencies are subject to a strict liability test with subjective elements. It is a test without limits; it would not recognise any efforts taken by an agency or whether matters were outside the agency's control.

3.4 ACFID submits that the ACNC Draft Bill should reflect the existing Australian and international requirements, rather than create a new, unworkable, obligation on the sector.

I. ACFID recommends that the phrase "ensuring", in 50-10(2)(c), should be deleted and "addressing" or "taking all reasonable effort to ensure" be inserted in its place.

3.5 There is an international effort and approach which is guiding Australia's efforts in relation to NFPs and counter terrorism, via the UN Financial Action Task Force "Special recommendation 9" which is a UN agreement on counter terrorism financing. This is mentioned in the Explanatory Memorandum to the ACNC Bill.

3.6 However, ACFID would like the Explanatory Memorandum to emphasise, in relation to external conduct standards for entities subject to the ACNC, the Financial Action Task Force's interpretative note:

"*Measures adopted by countries to protect the NPO sector from terrorist abuse* *should not disrupt or discourage legitimate charitable activities*." FATF Special Recommendations No 9 on Terrorist Financing [October 2008, p20] (our emphasis)

II. ACFID recommends that the Explanatory Memorandum note that any external conduct standards introduced in regulations pursuant to Division 50 of the ACNC Bill should not disrupt or discourage legitimate charitable activities, as recommended by the UN Financial Action Task Force.

4. **Adoption of sector-specific standards should extend to external conduct standards – Division 50**

4.1 ACFID welcomes recommendation 4 of the House Committee's report, and analysis at paragraphs 2.66 and 2.68, which recommend the ability of the Minister to adopt sector-specific governance standards by annexing them to regulations, and allowing specific sectors to comply with those standards, rather than the default set of governance standards. This recommendation has been implemented by s.45-10(4) ACNC Bill and paragraphs 5.37 to 5.39 of the Explanatory Memorandum.

4.2 ACFID welcomes this inclusion in the ACNC Bill as it recognises the important role the ACFID Code plays in the overseas aid and development sector . Each of ACFID's members already has comprehensive systems in place to ensure that they comply with the requirements in the ACFID Code and satisfy the annual audits which assess compliance against the ACFID Code. As set out in the introductory passage to these submissions, ACFID's Code is regarded as best practice across the world in the regulation of overseas aid organisations. Allowing ACFID members to continue to comply with the ACFID Code alone, instead of requiring them to also meet a more generic set of governance standards, will reduce confusion and the compliance burden in the sector.

4.3 ACFID can see no reason why the recommendation however, should not also apply to external conduct standards. AusAID already requires Australian NGOs to address the concerns set out in Division 50, and these are encompassed in ACFID's Code. Where a sector's code of conduct adequately addresses the objectives expressed in Division 50, compliance with the sector's code of conduct should be sufficient. The discretion remains with the Minister to determine whether a sector's code of conduct does adequately address the objectives of Division 50.

III. ACFID recommends that Division 50 be amended to allow the Minister to adopt a sector-specific code of conduct in lieu of external conduct standards by:

a. adding, in s.50-10, a sub-section in similar terms to s.45-10(4); and

b. adding commentary in the Explanatory Memorandum, in relation to Division 50 and the external conduct standards, similar to that at paragraphs 5.37 to 5.39.

B. GENERAL CONCERNS WITH ACNC DRAFT BILL

5. Ensuring the Independence of the Commissioner – Chapter 5, Part 5-2

5.1 The Government's initial statement about the ACNC was that the Commissioner will be "fully independent and report directly to Parliament via the Assistant Treasurer".[1] This element of independence has not, however, been explicitly stated within the ACNC Draft Bill.

5.2 We share the concerns of ACOSS that, given the practical back-office sharing arrangements with the ATO, the power to give information and documents to the ATO (Subdivision 60-E), and the historical and now different role of the ATO in this sector, it is fundamental that there is a clear legislative pronouncement that the ACNC, and its Commissioner, be independent. There must not be any actual, or perceived, direction or influence over the Commissioner by the ATO or others. A clear statement of independence should be inserted in Part 5-2, Division 110 of the ACNC Draft Bill.

IV. ACFID recommends that Part 5-2, Division 110, include a clear statement that the Commissioner is independent of Government and the ATO.

5.3 ACFID suggests that the proposed 120-5(2), which is appropriately directed to the independence of ACNC staff, could be strengthened by the insertion of the word "solely" before the words "subject to the directions of the Commissioner", to avoid any doubt that they could be subject to other directions (from, for example, the Commissioner of Taxation) at the same time.

V. ACFID recommends the insertion of the word "solely" in proposed 120-5(2).

6. Powers to issue warnings and directions need procedural fairness safeguards: Divisions 80 and 85

6.1 Under proposed Division 80, the ACNC Commissioner is empowered to issue formal written warnings to entities if the Commissioner reasonably believes that the registered entity has contravened a provision of the ACNC Act, not complied with a standard under the Act, or it is more likely than not that an entity will be in contravention or non-compliance. Division 85 provides that the ACNC Commissioner can issue directions on the same bases.

6.2 The consequence of a warning or direction being issued by the Commissioner is that the fact of the warning or direction, its details, the entity's response to it and its resolution, will be published on the ACNC Register under proposed section 40-5(1)(f)(i) and (ii). It could only be removed if it was inaccurate (s.40-10(2)(b) or if 5 years had passed and the Commissioner does not think it is in the public interest to keep it there (s.40-10(4)). It cannot be removed if the Commissioner acted too hastily and the concerns weren't as serious as he or she first thought or the organisation had already acted internally to rectify the situation.

6.3 Publication of the warnings or directions could have potentially serious ramifications for the entity in terms of continued public or government financial or other support for the entity.

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[1] See media release 10 May 2011.

6.4 Warnings and directions are, in themselves, punishment, rather than just a pre-cursor to punishment, and procedural fairness should be afforded to a registered entity prior to the Commissioner being permitted to issue them under Divisions 80 and 85.

6.5 Section 40-5(2) provides that publication of a warning or direction cannot occur until 14 days after it has been issued. This section would be meaningless unless procedural fairness was afforded OR a registered entity could actually have the power to convince the Commissioner that the warning or direction was not warranted and the Commissioner had the power to revoke it. Those powers do not exist.

6.6 Given the welcomed addition of show cause notices to Divisions 35 and 100, ACFID submits that those procedures should also be inserted into Divisions 80 and 85.

VI. ACFID submits that procedural fairness provisions, similar to sections 35-15 and 35-20, be inserted into Divisions 80 and 85 of the ACNC Bill.

7. **Additional reporting requirements must have safeguards – Subdivision 60-E**

7.1 Proposed Subdivision 60-E allows the Commissioner to request, from an entity, further reports, statements or information for the purpose of enabling a "recognised assessment activity" to be carried out. The latter term is defined, in proposed 55-10, to include assessments of an entitlement to registration, compliance with the Act and standards or taxation compliance.

7.2 This power is, to our mind, greater than the power held by ASIC, at s.1274, which is limited to determining whether to refuse to lodge a document. In many respects, it is a power to compel an entity to possibly provide self-incriminating information about non-compliance without any of the usual safeguards in place. The normal safeguards about the compulsion to give incriminating evidence must apply to this provision.

7.3 It also permits the compulsion of information about matters not within the province or control of the ACNC, for example taxation compliance, where potential criminal sanctions could flow. This is inappropriate and blurs the lines between the ACNC and the ATO. An information-sharing provision, which permits the ACNC to share information already held by it with another Commonwealth entity, is acceptable. However, a provision which requires the ACNC to gather information and documents for a separate entity, when the ATO has its own powers, and where such information or documents are not subject to the usual safeguards, is excessive and thus should be excluded from Subdivision 60-E.

7.4 There is another division in the ACNC Draft Bill which recognises the need for such safeguards when compelling the production of information and documents which relate to a provision of the Act which creates an offence or administrative penalty: see Division 70 and proposed sections 75-5 and 75-10 for definitions. Proposed 70-25 ensures that such information or documents are not admissible against the entity compelled. What has not been made clear in the ACNC Draft Bill is how this Division interacts with Subdivision 60-E. Arguably they do similar things, but there is no legislative clarity as to which takes precedence. There should be a clear statement that Division 60-E must be subject to Division 70. Of concern to ACFID is that information about taxation compliance, compellable under Division 60-E, which could result in criminal or other sanctions, does not fall within the terms of Division 70. If Subdivision 60-E retains the ability to compel information or documents relating to taxation compliance, proposed 75-5 should be amended to include a further sub-section encompassing offences under taxation legislation.

7.5 ACFID is also concerned that these provisions might create retrospective penalties. An example where this might arise is as follows: the Commissioner requests further information, reports or documents, for a period in the past (noting that it cannot exceed 6 years after the relevant financial period) when that information was not ordinarily kept or cannot be located because it was not required by the Act or standards under the Act or any accounting policy at the time. If an entity is later requested this information under proposed Subdivision 60-E, but cannot provide it, it should not be penalised for that failure, either for contravention of the Act or for failure to lodge a document on time (under proposed 175-C). To be penalised for a failure to provide past information, when there was no legal requirement to keep it at the time, would amount to a retrospective punitive provision.

VII. ACFID submits that proposed Subdivision 60-E be amended to:

i. **Include safeguards which protect entities when providing information etc which might be self-incriminating (in similar terms to proposed section 70-25);**
ii. **Not apply to assessments about taxation compliance (either by the deletion of sub-section 55-10(c) in the definition of "recognised assessment activity" or by specific exclusion in Subdivision 60-E);**
iii. **Include a statement that it is subject to Division 70;**
iv. **Ensure that entities cannot be penalised for any failure to provide information about a period when that information was not legally required to be kept at that time.**