



everyone's family

**The Smith Family's submission to the
House of Representatives Standing Committee on Economics
Inquiry into the Australian Charities and Not-for-profits
Commission Exposure Draft Bills**

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Background on The Smith Family

The Smith Family is a national, independent children's charity committed to increasing the educational participation and achievement of Australian children and young people in need. We provide holistic and long-term support from pre-school, through primary and secondary school and on to tertiary studies. In 2010-11, The Smith Family supported over 44,000 children, young people and parents/carers through its suite of *Learning for life* programs, including around 33,000 young people on an educational scholarship, approximately 4,500 of whom were of Aboriginal or Torres Strait Islander background. A further 73,000 children, young people and parents/carers participated in programs facilitated by The Smith Family, such as the Commonwealth Government's *Communities for Children* initiative.

The Smith Family has a strong focus on sustainability and draws its income from a range of sources. In 2010-11, its annual income was just over \$68.5 million. Just under a quarter of this was sourced from Government funding, over 60% from fundraising (donations and corporate support) and bequests, around 8% from the VIEW (Voice, Interests and Education of Women) Clubs of Australia and just over 3% from The Smith Family's commercial enterprise.

The Smith Family was established in 1922 and is a company limited by guarantee. It has Public Benevolent Institution and Deductible Gift Recipient status and is an Income Tax Exempt Charity.

Principles underpinning reform in the not-for-profit sector

The past decade has seen a significant number of reviews and inquiries regarding the charities and not-for-profit (NFP) sector, and these have involved substantial input and effort from a diverse range of stakeholders. These reviews have attested to the contribution that the NFP sector makes to the wellbeing of Australia, both from a social and economic perspective. These reviews also highlighted the diversity of challenges facing the sector which hamper its ability to maximise the contribution it makes to the nation. Some of the current arrangements for the sector are far from ideal. The Australian Taxation Office is currently both the determiner of charitable status and the collector of government revenue. This is not the preferred approach and is particularly problematic when appeal processes are difficult and expensive. In addition, the sector currently experiences the burden of multiple compliance, reporting and regulatory requirements that do not necessarily provide the type of transparency that would strengthen the sector.

The Smith Family has made submissions on a number of the proposed sectoral reforms which have been under discussion over the last twelve months, including the ACNC. It believes that fundamental to reforms in the NFP sector should be the complementary principles of:

1. Transparency and public accountability;
2. Certainty, consistency and workable compliance regimes; and
3. Maximising the contribution of the charities and not-for-profit sector to the Australian community.

The Smith Family believes it is now appropriate that action be taken that builds on the many reviews which have been undertaken and welcomes the establishment of the Australian Charities and Not-for-Profits Commission (ACNC). The legislation which supports its establishment, the ACNC's early areas of focus and the approach it takes, will be critical in ensuring both the short and long term achievements of the Commission and the continued support of key stakeholders.

In responding to this Inquiry, The Smith Family has drawn on the Exposure Bill, Explanatory Materials and the Implementation Report prepared by the ACNC Implementation Taskforce and released in June 2012. In doing so, it is cognisant of the need to have a legislative framework which supports the principles outlined above, but is not so prescriptive as to make the ACNC an inflexible institution unable to respond to the diversity of the sector and to changing requirements over time.

The ACNC Implementation Taskforce Report is particularly important in giving a sense of some of the practicalities for how the Commission will work, with many of these arrangements, in the interests of flexibility and responsiveness, not being prescribed in legislation. This approach requires the sector to take on trust some of the important practical components of the work of the ACNC, such as the set of governance standards which will apply. It is pleasing that the directions spelt out in the Implementation Taskforce Report suggest that a trust-based approach is reasonably well founded. The Smith Family is also mindful that it will take a number of years before the ACNC is fully functioning and able to achieve the range of objectives before it. Ongoing engagement of the sector along the lines of some of the work that has been identified by the Implementation Taskforce, will be important to the evolution of the Commission and its long term success.

Preamble and Objects in the Exposure Draft

The Smith Family welcomes the inclusion of a Preamble in the Exposure Draft and the significant changes in some of the key language included in the Objects in this version of the Exposure Draft. There are a number of improvements on the earlier version of the Bill which was circulated for public commentary in January this year. The preamble plays an important educative role, as well as appropriately situating the work and contribution of the NFP sector in the life of the Australian community. It recognises the unique nature and diversity of NFP entities, the distinctive role they play in promoting a broad range of community, altruistic and philanthropic purposes and in delivering vital services and benefits to communities throughout Australia.

The revised Objects of the Act are particularly welcome and mark a significant change in emphasis from the earlier draft. The Objects outlined in the January draft focussed on transparency and public accountability, at the expense of recognising the contribution that the sector has historically made. The earlier wording could have been read as implying a lack of public trust and confidence in NFPs. In contrast, the revised wording identifies that the Object of the Act is to *maintain, protect and enhance public trust and confidence in the Australian NFP sector*. This is much more in keeping with the third principle outlined above as needing to underpin reform in the sector. It provides a particular emphasis for the role of the ACNC which The Smith Family strongly supports.

In addition, the Act also now includes as one of its Objects, *to support and sustain a robust, vibrant, independent and innovative Australian NFP sector*, and this focus is also welcomed by The Smith Family. Central to the effectiveness of the sector in the past, and even more critical in the future, will be its capacity to be independent, innovative, robust and vibrant and this should be an important object for the establishment of the ACNC.

Key features and roles of the ACNC

The Smith Family has strongly endorsed that one of the key features of the ACNC and the Commissioner should be their independence and the details provided in Chapter 5 of the Bill, including an Annual Report direct to Parliament, will support this, as well as enabling public scrutiny of the work of the Commission. The financial and staffing arrangements for the Commission will also support its independence and over time it is anticipated that this will be further enhanced.

The Advisory Board identified in Chapter 6 of the Exposure Draft will be important to the ongoing work of the ACNC. While understanding the advisory nature of such a Board, the inclusion of the phrase 'at the request of the Commissioner' in relation to the provision of advice, at Division 135-15 paragraph 1, and explained at 10.63 in the Explanatory Materials is, in The Smith Family's view, unnecessary and undesirable, as it could result in the Board not offering advice in a proactive way. The ability to offer proactive advice is likely to be highly beneficial for the operation of the Commission, particularly given the calibre of members envisaged and the necessary stages of development that will occur for the Commission over the next few years. In addition to the Advisory Board, the Implementation Taskforce Report makes a clear commitment to ongoing engagement of stakeholders in the work of the ACNC, including on areas such as the proposed regulatory approach. The Smith Family supports this and that a number of the arrangements covering the work of the Commission are best dealt with in regulations and related documentation, rather than in the legislation that governs the Commission.

As noted above, The Smith Family believes that the current dual roles that the ATO as regulator and revenue collector are problematic for the sector. We therefore welcome the separation of these roles and the ACNC taking on the role of determining charitable status.

The education and support role, both for the sector and the broader public, identified particularly in the Implementation Taskforce report, are important functions for the ACNC. With respect to the former, the Taskforce report identifies that the ACNC's approach to guidance and education should recognise diversity, accessibility, timeliness and efficiency and this is appropriate.

In the important area of regulation, the principles of proportionality, transparency, fairness, timeliness and consistency are also identified by the Taskforce Report and these are supported. The approach of a pyramid of support and compliance which is included in the Taskforce Report, beginning with education and support, followed by multiple steps before suspension or deregistration, is appropriate for the sector.

The Exposure Draft also confirms that the Commission will have a level of flexibility in a range of areas, including in relation to those instances where significant breaches exist. The Smith Family would hold that there are only likely to be a very limited number of cases in which a charity (or indeed NFPs more generally) would deliberately misuse their status for unscrupulous ends. It is however important for both public confidence and for the wellbeing of the whole sector, that sanctions are able to be imposed, if, and when, unacceptable behaviour occurs.

The practicalities of the regulatory regime (which are not spelt out in the Exposure Draft) will make a significant difference on whether the principle of *certainty, consistency and workable compliance regimes* is realised and the related aim of reducing the current burden of reporting and red tape which many NFPs

currently experience. That aim is not likely to be achieved in the short term but remains critical in the medium term if the ACNC is to add significantly to the contribution the sector makes to the community.

The level of flexibility and discretion afforded to the Commissioner in relation to sanctions and related areas, and more generally across the operations of the Commission, is appropriate given the diversity of the sector. This includes the Commissioner's capacity under the legislation to withhold or remove information from the Register. The Smith Family is cognisant of the current and potential future contribution of Private Ancillary Funds (PAFs) to generate much needed philanthropic support in the Australian context. In light of this, The Smith Family is keen to ensure that there is nothing in the operation of the ACNC that limits the likely contribution of philanthropic donors. There has been concern that such donors may be turned off from contributing if their privacy cannot be guaranteed under the new arrangements. This is an area where The Smith Family believes the Commission should exercise its discretion around what material is made publically available, with the goal being to ensure maximum philanthropic contributions.

As identified above, one of the difficulties with the existing arrangements of regulating charitable status through the ATO, is that appeal processes are costly and difficult. The Exposure Draft identifies the review and appeal framework which will operate if an entity wants to challenge a decision made by the ACNC. The capacity to review decisions through the Administrative Appeals Tribunal (and/or the courts) is welcome. Concern has been expressed however about the absence in the Draft to stay the effect of any decision by the ACNC while a review or appeal is being heard. This is a departure from the principles of administrative law and The Smith Family supports the recommendation of ACOSS that *the AAT or Court have the discretion to determine whether to stay processes or not*.

While matters of resourcing cannot be covered within legislation, a key contributor to the success of the ACNC will be striking the appropriate balance between its role, available resources, and shorter and longer term priorities. Careful planning regarding priorities and implementation will be required in order that progress can be made on achieving the overall aims of the reforms and that this is done in a way that is manageable for all stakeholders. Ensuring an appropriate level of resourcing is allocated for the initial and ongoing 'education' role of the ACNC will be critical.

An important step

The Exposure Draft and the Parliamentary Inquiry into it, coupled with recent developments particularly through the work of the Implementation Taskforce, are important steps in the establishment of a Commission which has the potential over time to achieve the important objects identified for it in the Exposure Draft. As the Community Council for Australia (CCA) has noted in its submission, 'the ACNC Bills are not perfect' but The Smith Family also supports CCA's conclusion that the 'Bills enable the ACNC to begin to achieve what is now a long overdue reform'. They are an important step along the way to 'supporting and sustaining a robust, vibrant, independent and innovative Australian NFP sector' and one which The Smith Family broadly supports.