

30 August 2012

Committee Secretary
Senate Standing Committees on Community Affairs
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Parliament House
Canberra ACT 2600
By email: community.affairs.sen@aph.gov.au

Dear Committee

RE: Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012
Australian Charities and Not-for-profits Commission Bill 2012
Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012

Thank you for the opportunity to provide comments on the ongoing consideration of the above Bills. PilchConnect is an independent community legal service providing advice, information and training to not-for-profit (NFP) community organisations. Our submissions draw on our casework and reflections working with our client base of small/medium 'public interest' NFPs.

Regrettably, we are not in a position to deliver substantive comments on the above Bills in the timeframe available. We do however make the following summary points in relation to the three Bills before Committee:

- We do not support the inclusion of the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* in this current consultation, and continue to have reservations about the policy intent and impact these proposals will have on the NFP sector. See **Appendix A** for further details.
- We support the passage of the *Australian Charities and Not-for-profits Commission Bill 2012*, however we note ongoing concerns with some aspects of the legislative approach. See **Appendix B** for further details.
- We have not had an opportunity to properly scrutinise the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill* and therefore cannot provide substantive comments.

Thank you for the opportunity to contribute to the Committee's consideration of the Bills.

Yours sincerely,



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APPENDIX A: TAX LAWS AMENDMENT (SPECIAL CONDITIONS FOR NOT-FOR-PROFIT CONCESSIONS) BILL 2012

It is unfortunate in our view that the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (**the Special Conditions Bill**) is being introduced into Parliament and considered by the Senate and Joint Committees, in conjunction with the Bills to establish the Australian Charities and Not-for-profits Commission (**ACNC**). We note there is no reference in the Special Conditions Bill or its Explanatory Material to the ACNC and understand the measures in the Special Conditions Bill to be intended to sit outside of the regulatory framework of the ACNC. Despite the Special Conditions Bill being presented as a part of a 'package' of ACNC-related reforms, this tax reform should be considered separately to the establishment of the ACNC.¹

We submit the Special Conditions Bill should not be implemented in its current form, or at this time. The measures require further detailed consideration and consultation with the sector, which could be done as part of the wider review of taxation arrangements for the sector.² Our key concerns are outlined below.

Policy basis for the proposed measures

PilchConnect made submissions to the Treasury on an initial exposure draft (19 August 2011) and revised exposure draft (17 May 2012) of the Special Conditions Bill.³ In those submissions, we expressed our views about the inadequacy of the policy rationale underpinning the proposed measures, and noted that the Bill represents an unduly restrictive approach to achieving the objectives articulated in the Explanatory Material. We wish to take this opportunity to reemphasise that, if implemented, the proposed measures would impose some of the highest barriers to international participation and engagement by not-for-profits in the world.

We question whether the policy basis for the proposed measures is justified in our contemporary global world. We consider the Bill would produce results which are contrary to the Government's commitments to reducing regulatory complexity and encouraging innovation in the sector, and would result in significant uncertainty and confusion for tax concession NFPs.

Interaction with the Australian Charities and Not-for-Profits Commission

As identified in the initial rounds of consultation, the proposed measures go further than 'restating' the special conditions for not-for-profit tax concessions and impose additional requirements and barriers to NFP organisations seeking to obtain them.

In our view, the proposed approach could result in an undesirable situation where the ACNC and the ATO are imposing separate, but related and overlapping, regulatory requirements (which would commence at the same time). Furthermore, there is a very real risk that introduction of the measures outlined in the Special Conditions

¹ We note that the Bill introduces a standardised definition of 'not-for-profit.' That definition is adopted by the ACNC legislation. We understand, then, that in part the ACNC legislation relies on this Bill's successful passage. However, in our view, this could be very easily overcome by the inclusion of the standardised definition of 'not-for-profit' in the ACNC Bill. Indeed we consider that is the more appropriate place for such a definition. See also footnote 5 in relation to the definition in the Special Conditions Bill.

² The Government established a NFP Sector Tax Concession Working Group in 2012 to examine taxation concessions for NFPs and ideas for improvement. The terms of reference for the Group are wide and include examining the current range of tax concessions provided to the NFP sector and identifying whether there are fairer, simpler and more effective ways of delivering support through tax concessions to the NFP sector. It is to complete its work and provide recommendations to Government by Dec 2012: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/007.htm&pageID=003&min=mva&Year=&DocType=>

³ PilchConnect's previous submissions are available at www.pilch.org.au/taxreform/

Bill at the same time as the establishment of the ACNC will undermine the credibility of the ACNC in its early stages.

There is a clear need to avoid undue complexity and regulatory duplication between the new ACNC and the ATO. In our experience many NFPs are unsure, and sometimes misinformed, about what the relationship between these two regulators will be once the ACNC commences. Many NFPs that we work with are under the erroneous assumption that because the ACNC will soon regulate charities, any charitable/NFP tax concessions they are eligible for will also be determined by the ACNC. This confusion is understandable, given that currently the main reason that many organisations will seek endorsement as a charity from the ACNC is to access tax concession charity (TCC) status. Most groups do not appreciate that while they will soon be able to register with the ACNC as a charity, they may nevertheless be ineligible for tax concessions because they do not meet additional (new) special conditions, which are determined by the ATO.

Troublingly, we can foresee this complexity and regulatory duplication leading to a situation where the establishment of ACNC will be perceived (wrongly) as the instigator of what, for many organisations, will be a problematic new tax concession regime.

Continuing concerns

In light of the limited time afforded to provide comments to the Committee, we refer the Committee to our previous submissions for a more detailed analysis of our concerns regarding specific aspects of the legislation. We refer the Committee specifically to our concerns raised in relation to:

- The vagueness of the proposed test for operating in Australia and pursuing purposes in Australia;
- The introduction of a stricter test for deductible gift recipients;
- The lack of a fair and appropriate mechanism for prescribed entities; and
- The restrictiveness of provisions relating to certain government grants and gifts.

These concerns, along with many raised in submissions of the Melbourne University Not-for-Profit Project (to which our submissions refer) remain unaddressed.

We also encourage the Committee to have regard to submissions made by interested parties in the previous consultation on the revised exposure draft, in light of the limited time for sector representatives to submit to this Enquiry and the minimal changes in this Bill that respond to concerns raised in the previous consultation.

Conclusion

We are concerned that in an unexplained and unnecessary rush to have the legislation passed⁴ without due consideration given to the practical ramifications of the measures, the Government has missed a valuable opportunity to work with the sector, in the spirit of the National Compact, on a holistic approach to not-for-profit tax reform. The implications of the proposed measures have not, in our view, been adequately considered. We encourage the Committee to recommend the introduction of the Special Conditions Bill be deferred until further consideration is given to these and other concerns raised by the sector in this Enquiry.⁵

⁴ We refer the Committee, again by way of example, to apparent drafting errors in the Bill at clause 30-18 and a reference to the nonexistent *Australian Charities and Not-for-profits Legislation Amendment (Conditions for Tax Concessions) Act 2012* as evidence that the legislation requires further time and more careful consideration.

⁵ We note for example the concerns raised by Neumann&Turnour Lawyers in relation to the problematic definition of 'not-for-profit'.

APPENDIX B: AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012

As an independent community legal service providing support and training to community organisations, PilchConnect is aware of the regulatory and compliance burden faced by small-to-medium NFP organisations. Indeed, the high demand for our service is evidence that there is a need for free and low cost support for a sector that is often resource-poor yet shows a real desire to be compliant. We believe that an independent regulator with a commitment to education and support for the sector (while still having sufficient powers to preserve public trust and accountability) is a positive step, and one that we believe will have long-term benefit for NFPs.

Given the limited timeframe, we are not in a position to deliver substantive comments on the current drafts of the ACNC Bills. We instead refer the Committee to our earlier submissions in response to the previous version of the Bill when first introduced into Parliament⁶, and reiterate the following key points (which remain issues in the current Bill):

Governance standards

We continue to believe that the content of governance standards referred to in Part 3.1 of the ACNC Bill should be included in this consultation process. Without knowing the proposed nature and scope of these standards it is extremely difficult to properly assess the potential impact of the Bill, including its compliance burden on small volunteer-run organisations.

However, we are pleased to see the reference in the Explanatory Memorandum to ‘principle-based’ standards rather than prescriptive requirements. It will be vital that these standards be developed in close collaboration with the sector, and that they do not unduly interfere with an organisation’s autonomy and independence.

A sector-based consultative approach to the development and ongoing review of the governance standards is in our view ideally enshrined in legislation.

Administrative penalties and natural justice

We acknowledge the subsequent amendments to the Bill and Explanatory Memorandum in light of the House of Representatives Standing Committee on Economics’ recommendations, which go some way to addressing our concerns in relation to the perceived lack of procedural fairness and discretion built into the ACNC’s enforcement powers. Consistent with the Bill’s stated object of assisting charities to comply with and understand their obligations, we acknowledge that the Explanatory Memorandum outlines an approach to regulatory action which is both proportionate and subject to discretion, however greater reference to this discretion and flexibility in the Bill itself is in our view a preferred approach.

Drafting approach

We reiterate our concern with the overly technical language used throughout the Bill. Many terms are unfamiliar to the sector and not plain language. For example, the use of expressions such as ‘responsible entity’ of a ‘registered entity’, to refer to what will usually be a committee member of a charity, is extremely

⁶ See www.pilch.org.au/federalreform/ for a full list of our submissions to this process.

unhelpful. We submit this drafting approach is inappropriate, given the legislation is regulating charities, many of which are reliant on volunteers and have little or no access to the legal advice required to interpret such clauses. We again recommend that key definitions and terms used in the Bill (particularly 'responsible entity') be reconsidered.

Conclusion

While our previous submissions have highlighted some concern over aspects of the Draft Bill, we remain committed to and supportive of the establishment of the ACNC. Our ongoing interaction with the ACNC Implementation Taskforce since its inception has consistently reassured us that the interests of the NFP sector is of paramount importance to those involved, and while there may be some initial compliance hurdles, we are confident that the ACNC will provide vital and substantial advantages to the NFP sector once it is given the opportunity to do so.