

Council For The National Interest

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22 February 2018

Mr Murray Crowe
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
Parkes ACT 2600

REF: Submission to the appointed panel for the review of the (ACNC)
Australian Charities and not for profit (Consequential and Transitional) Act 2012

Dear Mr Murray Crowe,

Attached is the submission from the Council for the National Interest (CNI) in response to a Review of Australian Charities and Not-for-profits Commission (ACNC) legislation, Terms of reference, 20 December 2017.

Included in our submission as an attachment is a copy of the Council for the National Interest Submission to The Expert Panel on Religious Freedom dated 10 February 2018. This attachment is referred to in the CNI submission, page 6, item 3.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Graeme Wishart', is written over a light blue horizontal line.

Graeme Wishart
Chairman,
Council For The National Interest

SUBMISSION TO THE APPOINTED PANEL FOR REVIEW OF THE (ACNC)
AUSTRALIAN CHARITIES AND NOT FOR PROFIT (CONSEQUENTIAL AND
TRANSITIONAL) ACT 2012

TO

Date 20-1-2018

The Principal Advisor

Individuals and Indirect Tax Division

The Treasury,

Langdon Crescent,

PARKES ACT 2600

Dear Mr Murray Crowe

With regard to the terms of reference and some of the issues the public have been invited by Treasury to focus on, the Council for The National Interest (CNI) has prepared the enclosed submission for the ACNC review. The CNI has included some additional merging concerns in the submission for the review panel to consider.

Responding to the Treasury focus questions, we recommend the following:

1. ARE THE OBJECTS OF THE ACNC ACT STILL CONTEMPORARY?

With regard to the objectives of the Act being met, the CNI strongly recommends the inclusion of core objectives such as,

- a) the requirement for NPO entities to meet high standards of accountability to donors, the public and beneficiaries.
- b) promote and provide for more transparency for the public to be assured that charities are directing funds into their charitable purposes effectively.

2. ARE THERE GAPS IN THE CURRENT REGULATORY FRAMEWORK THAT PREVENT THE OBJECTS OF THE ACT BEING MET?

The CNI recommends that the current regulatory framework be strengthened where appropriate to meet all the ACNC objectives effectively, including the CNI recommendations in (1) if adopted.

3. SHOULD THE REGULATORY FRAMEWORK BE EXTENDED BEYOND JUST REGISTERED CHARITIES TO COVER OTHER CLASSES OF NOT FOR PROFITS?

Assuming that there will be a wide range of recommendations for the the review panel to consider, the CNI will look forward to the final report. The panel will need to ensure that the ACNC has sufficient resourcing and capabilities to take on any additional work load associated with extending the regulatory framework. The gaps and weaknesses in the regulatory framework should be fixed before extending beyond registered charities.

4. WHAT ACTIVITIES OR BEHAVIOURS BY CHARITIES AND NOT FOR PROFITS HAVE THE GREATEST ABILITY TO ERODE PUBLIC TRUST AND CONFIDENCE IN THE SECTOR?

Poor fund raising practices, lack of transparency about commission based fund raising, poorly targeted marketing, wasteful spending, misuse of funds, poor management including lack of awareness and education about the responsibilities of office bearers. Large administrative costs in comparison to charity output, and lack of donor involvement and scrutiny. Scandals associated with some collapsed charities can diminish the public trust. The CNI strongly supports any recommendations to improve

guidance measures and governance with the powers of the ACNC strengthened where appropriate.

5. IS THERE SUFFICIENT TRANSPARENCY TO INFORM THE ACNC AND THE PUBLIC MORE BROADLY THAT FUNDS ARE BEING USED FOR THE PURPOSE INTENDED?

The CNI recommends that the ACNC continue to improve the quality of information from the NPO and charity sector. A suggestion would be to make further provisions in the annual reports and information statements regarding progress and impact for the ACNC register.

Increased transparency will increase the public trust and confidence in the system. To fully appreciate the work charities do, the public needs to see a strong connection between funding and purpose.

6. HAVE THE RISKS OF MISCONDUCT BY CHARITIES AND NOT-FOR-PROFITS, OR THOSE THAT WORK FOR THEM, BEEN APPROPRIATELY ADDRESSED BY THE ACNC LEGISLATION AND THE ESTABLISHMENT OF ACNC?

In the interests of the public, the donors, the beneficiaries and the organisations, the CNI fully supports any changes to legislation to minimise the risks, particularly criminal connections, financing terrorists, fraud, money laundering, or any other abuse of the registered organisations.

The CNI understands the need for government and inter- government strategies and regulations for the protection of the global financial system and the National interests. We are aware that the ACNC has raised the issue of due diligence with all registered organisations in

this regard. For further protection, the CNI sees a need to ensure that the responsible persons in charge of exposed organisations, have back ground checks and meet high standards.

7. ARE THE POWERS OF THE ACNC COMMISSIONER THE RIGHT POWERS TO ADDRESS THE RISK OF MISCONDUCT BY CHARITIES AND THE NOT-FOR-PROFITS, OR THOSE THAT WORK FOR THEM, SO AS TO MAINTAIN THE PUBLIC'S TRUST AND CONFIDENCE? IS GREATER TRANSPARENCY REQUIRED AND WOULD ADDITIONAL POWERS BE APPROPRIATE?

Greater transparency is required. This would allow the public and donors to have an increased roll to play in maintaining the integrity of the NPO and charity sector as well as the ACNC. Sharing information and the data analysed will also keep the public, donors and beneficiaries well informed and maintain trust.

The CNI understands that the ACNC compliance powers can be applied where necessary to all registered charities. Due to the different types of entities there are likely to be gaps preventing the ACNC from exercising formal action. The Council for The National interest recommends strengthening any formal powers where appropriate in order to meet its objectives and do its job without obstruction.

8. HAS THE ACNC LEGISLATION BEEN SUCCESSFUL IN REDUCING ANY DUPLICATIVE REPORTING BURDEN ON CHARITIES? WHAT OPPORTUNITIES EXIST TO FURTHER REDUCE REGULATORY BURDEN?

Reduction of duplication may be justified in some cases, this very much

depends on the type of entity, the size, the activities and charitable purpose and laws across states and territories which are not uniform. It may not be as easy as it sounds for the ACNC to fulfil the over- all objective, to be a “one stop reporting shop”. There are some aspects of the NPO and Charity sector where more reliable reporting and data analysis will provide an improved picture of any additional needs yet to be addressed. A high level of reporting and scrutiny is critical for organisations providing essential services and care for some very vulnerable members of our community, aged care, child care, child health and education, the sick and handicapped, homeless etc. Duplication and multiple levels of reporting in some instances provides a safety net via other regulatory bodies at the state or territory level. Reducing the burden of reporting for charities and Not-For-Profits will require careful consideration, weighed against maintaining high reporting standards, as well as improvements to transparency and scrutiny where necessary.

9. HAS THE ACNC LEGISLATION AND EFFORTS OF THE ACNC OVER THE FIRST FIVE YEARS STRUCK THE RIGHT BALANCE BETWEEN SUPPORTING CHARITIES TO DO THE RIGHT THING AND DETERRING OR DEALING WITH MISCONDUCT?

The CNI acknowledges the efforts of the ACNC to establish an independent body to regulate the Not-For-Profit and charity sector.

It was never going to be an easy task to systematize all the various organisations. The Council for The National Interest is in favour of strengthening the regulatory framework to allow for more robust

compliance action where appropriate and increased legal powers P 6
where there are gaps.

Some of the merging issues which the CNI would like to bring to the attention of the review panel are:

1. ON-LINE FUND RAISING.

With the increasing number of Not-For-Profits and charities fundraising through websites and various on-line platforms, does the ACNC have sufficient regulatory powers across all the state and territories and beyond the Australian borders?

2. POLITICAL DONATIONS TO OR FROM THE NPO AND CHARITY SECTOR

The Parliamentary Standing Committee for Electoral Reform is currently reviewing political donations as part of an ongoing enquiry into the 2016 Federal Election.

After highlighting the importance of increased transparency in the Not -For-Profit and charity sector in this submission, CNI strongly recommends that the NPO organisations should all be required to report political donations to the Australian Electoral Commission on the same basis as for other individuals and various entities outside the NPO and charity sector. Furthermore, political activism within the Not-For-Profit and charity sector should be as transparent as possible.

3. THE ACNC LEGISLATION DOES NOT HAVE A DEFINITION FOR "RELIGION"

A CNI submission to The Expert Panel on Religious Freedom has been attached to the ACNC submission for your consideration.

Yours Sincerely,

Denis Whiteley
Executive Director
20th February 2018

Council For The National Interest

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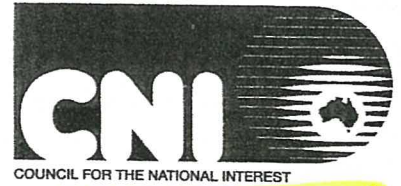
ABN 43 775 878 315

Submission to The Expert Panel on Religious Freedom

C/- Department of Prime Minister and Cabinet

PO Box 6500

CANBERRA ACT 2600



REFER. PAGE 6
ITEM 3.

By Email to: religiousfreedom@pmc.gov.au

We consent to this Submission being made public.

Introduction – this submission is broadly relevant to the Terms of Reference but as a precursor comments on the objective of the Expert Panel. The objective is *The Panel shall examine and report whether Australian Law (Commonwealth, State, Australian Territory) adequately protects the human right to freedom of religion.*

It is our view that a prerequisite of such an examination is a definition of ‘religion’ as might have been contemplated by the founders of the Australian Constitution, initially and is relevant today.

The comments in the following section draw on *Religion and the Constitution – an Illusory Freedom, Michael Eburn, Law, University of New England.*

The Australian Constitution – Section 116 states *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

Section 116 is a denial of legislative power to the Commonwealth and no more. No similar constraint is imposed upon the legislatures of the States. It follows therefore that if there is to be a guarantee of religious freedom to all Australians then there should be enacted a Commonwealth Law that does not conflict with Section 116 and is complemented by the enactment of a similar law in all States and Australian Territories.

The paper, referred to above explores the case of *The Church of New Faith v The Commissioner of Pay-Roll Tax (Vic)* where an attempt was made to set out a definition of religion to determine whether the ‘Church of the New Faith’ (Scientology) was a religion within the meaning of the Victorian Pay-Roll Tax Act.

Although the Court did not agree on a definition of religion two of the Judges, Mason and Brennan, did find that a more objective criterion was required for the definition of religion than to label a group a ‘religion’ simply because the group claimed for itself the title of ‘religion’. They said:

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, the belief in a supernatural Being, Thing or Principal; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

These criteria, appropriately, would eliminate from a definition of religion organizations such as *The Church of the Flying Spaghetti Monster* and others which can be opportunist.

Furthermore, complementing the reference in the criteria to *cannons of conduct which offend against ordinary laws are outside the area of any immunity*, the International Covenant on Civil and Political Rights to which Australia is a party, Section 18 states inter-alia :

1. *Everyone shall have the right to freedom of thought, conscience and religion.....*
2. *No-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice;*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals of fundamental rights and freedoms of others.*

There are a number of cases in the paper referred to where the Commonwealth has passed a law that to some extent restricts a person's right to practice their religion but the purpose of the legislation was to meet a valid Commonwealth purpose not a primary restriction of religion.

Summary – in his paper, Michael Eburn says:

In summary, notwithstanding s. 116 of the Constitution, the Commonwealth may make laws that restrict a person's right to practice their religion provided that:

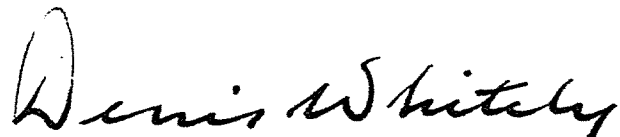
- *the law is a law to meet a valid Commonwealth purpose;*
- *any restriction is ancillary or secondary, that is the purpose of the law is not to restrict religious freedom per se;*
- *any restriction is not undue; or*
- *the law limits the practice of religion only to the extent necessary to protect the rights of others, ie in a way that is not inconsistent with the concept of 'freedom' which is necessarily limited in a co-operative society.*

Conclusion – in our view, in order for the Expert Panel to meet the objective of the Inquiry, it is essential that the concept of a 'religion' that a person is free to practice, be defined and be uniformly accepted by the Commonwealth, States and Australian Territories.

Recommendation – CNI RECOMMENDS:

1. that for the purpose of freedom of religion the criteria for a religion be:
 - a belief in a Supernatural Being, Thing or Principle - in essence 'faith based' organizations;
 - acceptance of cannons of conduct in order to give effect to the belief;
 - the cannons (teachings, philosophies or actions) are not seditious and do not offend the rights of the believers or others who are non-believers;
 - where the cannons (teachings, philosophies or actions) are seditious or do offend others the religion will be disqualified as a religion until the seditious or offensive cannons (teachings, philosophies, actions) are permanently removed.

2. that the Commonwealth, all States and Australian territories enact complementary uniform legislation to give effect to Recommendation 1.

A handwritten signature in black ink that reads "Denis Whitely". The signature is written in a cursive style with a large, looped initial 'D'.

Denis J Whitely – Executive Director
10 February 2018