



Australia's Charities and Not-for-profits

Written Submission

The Options Paper, Australia's Charities and Not-for-profits sets out proposed replacement arrangements for charities in Australia. The paper outlines policy directions proposed by the Government to introduce effective replacement arrangements that reduce the burden of regulation on the civil society sector.

The paper is being released to seek feedback from charities and interested parties on the proposed replacement options. Comments and feedback will inform development of the replacement arrangements. A summary of written submissions will be provided on the Department's website in September 2014.

Please use this submission template to provide your feedback on the proposed replacement arrangements for charities in Australia.

Completed submissions are to be sent by 20 August 2014 to:

consultationwithcharities@dss.gov.au (preferred method) OR

Civil Society and Programme Delivery Policy Branch

Department of Social Services PO BOX 7576

Canberra Business Centre, ACT 2610

Submissions received after 20 August may not be considered.

Unless otherwise stated, the information and feedback you provide may be used for publishing purposes. Please state if you do not wish for your comments to be published.

Instructions for completing the Submission Template

- Download and save a copy of the template to your computer.
- Refer to the *Options Paper, Australia's Charities and Not-for-profits* for context and discussion questions.
- You do not need to respond to all of the questions.
- Please keep your answers relevant to the topic being addressed, we ask that submissions be limited to two pages.

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If submitting on behalf of a company or organisation

Name of organisation: personal submission – the views expressed herein are my own and do not purport to represent the views of the Australian National University or the Australia and New Zealand School of Government

Stakeholder category: academic

State/Territory: ACT

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Response to Options Paper:

The starting point for this submission is that the changes being proposed by the Commonwealth government are unnecessary and retrograde. The reforms to charity regulation implemented by the previous government were well-crafted, and subject to extensive consultation with relevant stakeholders. The establishment of the ACNC was a long-overdue reform that gave effect to a long-standing desire within the not-for-profit sector for a national regulator. The Productivity Commission's 2010 report on the contribution of the not-for-profit sector provided a well-reasoned policy foundation for an agency such as the ACNC.

I also draw attention to the report by the House of Representatives' Committee on Legal and Constitutional Affairs (2006) – commissioned by then Attorney-General Philip Ruddock – into the Harmonisation of Legal Systems, which concluded:

"National harmonisation of current reporting and disclosure requirements for the not-for-profit sector would also assist in reducing compliance costs and in maintaining community confidence in the sector. In addition, the Committee considers that a review of the current licensing and registration requirements for not-for-profit organisations across the jurisdictions should be undertaken with a view to legal harmonisation."

At that time the Fundraising Institute of Australia submitted to the Committee that a 'simplified and rational legislative framework' is necessary to simplify the regulatory environment for the not-for-profit sector and reduce compliance costs. The FIA also proposed the establishment of a single Commonwealth regulatory framework; the establishment of a new national regulator for the not-for-profit sector; and the development of a national mandatory code of conduct for the sector.

Accordingly, the Committee – which, it must be noted had a majority of Coalition members – offered the following recommendation:

Recommendation 18 (paragraph 4.120) The Committee recommends that the Australian Government, in consultation with the not-for-profit sector and the States and Territories:

- *Investigate the establishment of a single national regulator for the not-for-profit sector;*
- *Investigate the development of a simple but adequate legal structure for not-for-profit organisations;*
- *Initiate work towards the national legislative harmonisation of simple but adequate reporting and disclosure requirements for not-for-profit organisations; and*
- *Undertake a review of current licensing and registration requirements for not-for-profit organisations across the jurisdictions with a view to legislative harmonisation of these requirements.*

In this light, the establishment of the ACNC would appear to represent the logical culmination of what was once a bipartisan view in favour of a national charity regulator.

At this point, I would remind the government that persons/organisation represented at consultation sessions convened in Canberra by the Department of Social Services were unanimous in their praise for the ACNC, its leadership and its staff. They praised its willingness to work with *'all levels of the sector, not just the elite few'* and extolled the virtues of the reporting framework.

One representative of a major national charity said:

'I cannot see how the abolition of the ACNC increases transparency or reduces the burden on the sector. This defies logic. We have to assume it is premised on an ideological fixation rather than a rational proposal to assist civil society organisations'.

A representative of a major international charity reported that their organisation had *'no concerns about the ACNC'* and suggested that the proposed replacement structure would represent a *'regulatory impost'*, adding that their organisation *'cannot see the benefit'* of the proposed changes. The same person emphasised that the current regime is *'simple, accessible and efficient'* adding that the ACNC has been exemplary in terms of the level of support provided to the sector - a view echoed by other participants.

I would add that the consultation paper prepared by the Department of Social Services – like the *Explanatory Memorandum* accompanying the *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014* was significantly lacking in both detail and analytical rigor and, in my view offered an insufficient basis for meaningful consultation on such an important issue.

I will now turn to the questions raised by the discussion paper:

1. Self-reporting requirements to ensure public accountability for charities' operations

I consider that the options for self-reporting set out in the consultations *manifestly* defeat the purposes of accountability and transparency. The proposals were not supported by stakeholders present at the consultations, most of whom argued strongly for the retention of mandatory reporting via a single national portal. A number of stakeholders noted the ease of reporting and underscored the value of the ACNC's *'report once, use often'* reporting framework. Stakeholders were justifiably sceptical about the Department's suggestion that they report via their websites or social media. There are around 57,000 registered charities in Australia. Clearly it is not contemplated that the ATO will be resourced to systematically audit compliance with the self-reporting regime – it was made clear by ATO representatives that only egregious failures to comply would attract sanction.

In addition to enhancing compliance and accountability, the ACNC's compulsory reporting framework would have provided a significant lever for the harmonisation of reporting requirements – already the ACT and South Australia had committed to harmonising their own reporting frameworks with the ACNC and, if it continued, other jurisdictions would likely follow suit. The current government's proposals will do nothing to relieve charities of the compliance burden associated with reporting to multiple funding agencies and levels of government.

Finally, the current reporting framework supports the collection, collation and analysis of data for the purposes of providing a strong evidentiary basis for public policy. A self-reporting regime will not support the collection and aggregation of essential data. Even if standardised templates were promulgated for the presentation of data, the quality and accuracy of data would likely deteriorate over time (putting aside the issue of the cost and difficulty associated with harvesting data from tens of thousands of websites or other platforms).

2. Returning determination of charitable status to the ATO with a framework in place to ensure independence of decision-making.

This is a matter of grave concern to a majority of stakeholders. Despite the well-meaning assurances offered by ATO officials, those attending the Canberra consultations regard a return to the ATO of regulatory oversight for charities a retrograde step. We need only look to the current situation on Canada where a debate is raging in relation to allegations that the Canadian government has directed and funded the Canada Revenue

Agency to aggressively conduct punitive audits of charities alleged to be engaging in policy advocacy to appreciate the not-unfounded concerns of Australian charities.¹

This is particularly concerning in light of recent reports that revised service agreements under which the federal government provides funding to community legal centres specifically state that organisations cannot use Commonwealth money for any activity directed towards law reform or advocacy.² One is entitled to wonder about the government's intentions, especially considering the provisions of sections 4 and 5 of the *Not-for-profit Sector Freedom to Advocate Act 2013* (which Minister Andrews says he voted for and supports) which state:

4. Agency not to include prohibited content in Commonwealth agreement

(1) An agency must not include prohibited content in a Commonwealth agreement.

(2) If, apart from this subsection, a Commonwealth agreement includes prohibited content, that prohibited content is void.

5. Prohibited content

(1) Prohibited content is any requirement that restricts or prevents a not-for-profit entity (including staff of the not-for-profit entity) from commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth.

The discussion paper prepared by the Department contains insufficient detail of proposed administrative options for the establishment of replacement arrangements under which responsibility for determining eligibility for charitable status would return to the ATO. ATO officers attending the Canberra consultations conceded that there had been no detailed thinking about the possible form or resourcing for any replacement options. It is almost impossible to offer informed comment on such a proposal, and I therefore share the concerns of many charities about the potential for a significant conflict of interest.

3. A proportionate compliance framework that would leverage existing powers.

The government's proposals do little more than ensure that the *status quo ante* prevails. It has long been recognised that the legislative and regulatory framework under which Australian charities operate is fragmented, ineffective and burdensome. The government's proposals to dismantle the previous government's regulatory reforms is incomprehensible.

4. Appropriate transitional arrangements to provide certainty for the sector.

This question presumes the inevitability and desirability of change. I do not accept either proposition, and therefore, apart from arguing in favour of 'no change' I find myself unable to offer any constructive response to the question.

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¹ Canadian Broadcasting Corporation (2014). 'CRA charity audits: Committee has 'no plans' to look into alleged interference'. 18 August 2014, <http://www.cbc.ca/news/politics/cra-charity-audits-committee-has-no-plans-to-look-into-alleged-interference-1.2739685>

² Seccombe, Mike (2104) 'Brandis ties NGO funding to non-advocacy'. *The Saturday Paper*, July 26, 2014.