



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.

Name (first and surname): Enter your name Lewis

If submitting on behalf of a company or organisation

Name of organisation: Organisation name (if applicable) Riding for the Disabled Association (NSW)

Stakeholder category (e.g. service provider, client, peak body, academic): Peak Body

State/Territory: NSW

Contact email address: margie.lewis@rdansw.org.au

Response to Options Paper:

- Do you believe that these proposed requirements will be less time consuming than current requirements?

Until full details are available, it is not possible to comment on whether the proposed requirements will be less time consuming than the current requirements.

Looked at from a different angle, should the proposals be fully implemented, there could be savings to the Revenue as a result limiting the “leakage” of revenue by way of improperly claimed tax exemptions by an entity which may not be entitled to the exemption as well as through improperly claimed income tax deductions by donors to the entity (both being in cases where the entity is not entitled, at law, to treatment as a tax exempt organisation).

Where there could be benefits to both the Revenue and to the genuine charities and not for profit (NFP) organisations, is the use of part of the revenue savings arising from these measures to offset any additional requirements on those charities and NFP organisations. This could be achieved largely by assistance to those charities and NFP organisations, whether that assistance is provided by way of direct financial assistance or assistance in kind.

- What changes would your organisation need to make to meet the new requirements?

As stated above, to fully answer this question, some further information on how the proposed provisions will be implemented is required.

In relation to our organisation, we have a head organisation which is a corporation limited by guarantee. Allied to this organisation there are a number of branches, or “Centres” (presently 38), none of which are incorporated. These branches operate independently of each other and, while under the direction and control of the head organisation, are required to be financed independently of the head organisation and of each other Centre.

Each branch operates under its own Constitution (although the separate Constitutions are substantively in similar terms but modified to meet the specific circumstances of each particular branch). As the roles of the branches and of the head organisation differ, the Constitution of the head organisation is designed to apply to the role of the head organisation.

While the head organisation provides assistance to each of its branches, that assistance is by way of guidance, training, advice, coordination of the work and role of the organisation, general oversight of operations, arranging for broadform insurance cover for the whole organisation (the head organisation and each of its branches, as well as all staff, volunteers and those who use the services of the organisation), and so on.

While, at law, any asset owned by one of the branches arguably belongs to the head organisation, each branch is financially separate from each other branch and from the head organisation. This means that the head organisation and each branch account separately for their own operations and this includes attending to their own financial and other record-keeping activities.

This arrangement may, depending on how they are implemented, lead to increased complexity, as well as costs, under the proposed arrangement, with these compliance costs falling onto the head organisation and, potentially, each branch.

Another potential issue is that, given the manner in which each branch operates, the separate branches may each be considered to be an independent small reporting entity and therefore largely exempt from the proposed reporting requirements. If this happens, it is reasonable to assume that, depending on the final form of the provisions, there will be no change required to the status quo. However, if there needs to be consolidation of accounts between the head organisation and each of the branches, there would be expected to be substantial compliance difficulties and costs.

- Do you foresee any impediments to charities complying with these requirements?

One possible impediment to charities complying with these requirements would be the potentially adverse effects that could flow from disclosure of the financial situation of the charity. This is because someone looking at the accounts on the website could obtain the impression that the charity may be relatively well-off in financial terms. This could be a normal reaction by someone who is not familiar with accounting principles and the particular needs of the organisation.

For example, the charity may have a substantial reserve of funds. However these funds may have been built up over a number of years in order to meet expected substantial, and essential, capital expenditure. Someone seeing this in the accounts as published on a website may have second thoughts about whether to make a donation to the charity. This, in turn, could conceivably have the effect of denying the charity the necessary funds which are needed for it to provide its services. Should this happen, the organisation would then be in a position of having to utilise the necessary capital reserves which were intended for essential capital expenditure for the provision of day-to-day services.

Alternatively, the organisation may need to have funds in reserve in order to meet fluctuations between its fundraising for operational purposes and the need to fund its operational activities. Again, someone seeing that reserve amount may consider that it is not necessary for the organisation to be the subject of donations which that organisation would need in order to conduct its activities.

An alternative to publishing accounts on a website, it is suggested that consideration be given to requiring the organisations to supply their accounts to the regulator (ATO or ASIC or both) for review by the regulator as part of that regulator's general oversight of the charity and NFP sector.

- Do you believe these requirements will provide transparency? If not, what changes would you make?

Transparency is vitally important in order to ensure that there is the appropriate accountability in respect of not only the taxation and other financial benefits accorded to charities and other not-for-profit organisations, but also for the maintenance of confidence in the sector by those who make financial donations to such organisations.

What needs to be considered is the potential effect on the charities by these arrangements. This effect can be at the cost of either, or both, finances and time.

Where an organisation is run solely by volunteers who devote as much time as possible in the provision of the services provided by the charity and the NFP organisation, the requirement to do much more than is needed for the organisation's own reporting needs can be an onerous task.

Each organisation needs to prepare accurate accounting or bookkeeping records for its own purposes. Submitting these to the appropriate authority (such as the ATO) on an annual basis could be a means of providing some official "oversight". This can provide protection for the indirect "investment" made by the Nation to the charity and NFP sector by way of tax concessions.

Such reporting will be in addition to the acquittal process which already takes place in the case of grants received by the charity or NFP organisation from Government (whether Federal, State or Local). It is important that such acquittal processes be thorough enough to justify and protect the direct "investment" by way of grant funding.

Where funding is provided by way of donations, it would be up to the donor to satisfy themselves as to the prudential requirements which that donor would want to implement. This is because any genuine direct donor would not be likely to make a donation if they had any doubts about both the genuineness of the charity or NFP and how the donated funds will be used for the benefit of the works of the charity or NFP.

Despite this, care needs to be taken to ensure that the charity or NFP is genuinely engaged in appropriate activities and is not being used as a vehicle to assist tax avoidance (including, for example, by "laundering" funds through a closely held structure masquerading as a charity or NFP). Giving an organisation such as the ATO the ability to risk-assess charities and NFP organisations and to randomly conduct audits, would be a far better protection measure for the investment made by the country in charities and NFP organisations (by way of tax concessions and grants). Such independent oversight would also be far more reliable and "transparent" than under the proposal, because the proposal is dependent upon the information which is made available to the general public by the charities and NFP organisations. It is very easy to supply "raw" figures in accounts to give a particular impression where there may be limited real independent oversight of the real situation.

As stated above (refer to the response to the preceding question), publishing a charity or NFP organisation's accounts on a website may have unintended consequences for the organisation. However publishing accounts on a website does not necessarily guarantee transparency and may, as stated above, result in a severe financial loss to the organisation through the reduction of donations which may otherwise have been received. On the other hand, those organisations which seek to "hide" the true status of their accounts may unduly or incorrectly benefit by being able to attract funds which they may not otherwise have received.

- Which of these options do you believe best guarantees the independence of the decision making process?

The two options present a good framework for the oversight of the administration of charities and NFP organisations. However it is suggested that it should not be an "either/or" option between the two, but rather a combination of the two plus other procedures (refer to comments to the end of this question in relation to this proposal).

As noted in the Options Paper, the ATO Panels, including the General Anti-Avoidance Review Panel, are made up of very senior officers from the ATO as well as external specialists (generally accounting and legal practitioners). Due to legal constraints (in particular the operation of administrative law, the opinions of these panels can only be by way of guidance, but it is suggested that it would be highly unlikely that a more junior ATO officer would ignore the views of senior ATO officers and highly experienced external practitioners.

However, should a taxpayer not accept the decision of the ATO when the opinion of the panel is put into effect, the taxpayer still retains the right to have the matter referred to the Administrative Appeals Tribunal (AAT) or to the Federal Court. Even if the matter is reviewed by the AAT, whichever party is not successful at the AAT can appeal the decision to the Federal Court or Full Federal Court and then even to the High Court.

It is therefore suggested that the oversight of the charity and NFP sector, if vested on the ATO as proposed, be by way of both of the suggested options operating as separate oversight and review avenues.

Having an area in the ATO which specialises in charities and not-for-profits is an extremely important proposal which needs to be adopted. This is not because of the stated perceived perception of bias. Rather it is because a specialist area is able to obtain better in-depth knowledge and understanding of the particular area, in this instance charities and not-for profits. This is what happens now in relation to such things as GST and superannuation where the ATO has specialist areas dealing with these matters.

Also, just as happens now in the ATO, there should be the possibility of review by a "panel", as well as "internal review" (as happens now in the ATO's process of determining objections by taxpayers). This internal review should be structured in a way that gives confidence in the process that the decision-maker in the review is independent, in the decision-making process, from the original decision-maker.

Should the internal review find in favour of the charity or NFP, such internal review would be expected to be far more cost-effective for all parties, that is the particular charity or NFP, the ATO and the members of the panel who are external to the ATO (and would reasonably be expected to

be remunerated at a rate which at least equals, if not exceeds, the cost of the ATO reviewers), not to mention the potential subsequent totally external review processes via the AAT and the Courts.

- Are there any other considerations that should be taken into account when these functions are undertaken?

Under present arrangements involving the interpretation and application of the various taxation laws, the prospect and possibility of any matter can be reviewed at a number of different levels. However, in reality, only a very small number of such matters where there may be initial disputes between the ATO and taxpayers proceed to litigation. This is because while the role of the ATO is to collect taxes, its other role is to apply the law as presented by parliament and to collect the taxes which are properly payable under those laws. The AAT and Courts are, similarly, charged with the responsibility of interpreting and applying the particular legislative provisions.

Any legislation which is to be applied by the decision-maker, be that the ATO, the AAT or the Courts, must be sufficiently well drafted to reduce the possibility of misunderstanding or misinterpretation. Clear, detailed and unambiguous legislation is one of the best ways of removing, or at least greatly reducing, the possibility of decisions which are likely to be disputed and for removing or reducing difficulties which charities and not-for-profits may face in their attempts to comply with the law.

Another possible option for consideration is to create a specialist "arm" of the AAT, similar to that which presently exists via the Small Taxation Claims Tribunal. Such option should greatly reduce the costs to organisations which are seeking an independent review of a decision which has been made by the ATO.

- Are there any reasons why this approach may not work?

There is always the possibility that a risk assessment based oversight and review will allow some entities to "slip through the net". However, it is far better than a system where any oversight and review is on an "ad hoc" basis or the result of random review.

It is therefore necessary to ensure that the review process is sufficiently robust to ensure that the data on which the risk assessment reviews are conducted is sufficiently accurate. This may require additional "random" audits to determine compliance.

Regardless of what process is finally adopted, it is essential that consideration be given to ensure that the costs to the charity or NFP organisation involved is kept to a minimum and, ideally, the charity or NFP organisation assisted, either financially or in kind, to allow it to undertake the process. This is vitally important, particularly in relation to the smaller charities and NFP organisations, as there is usually very little money which is not needed for the purposes for which the charity or NFP organisation exists and the spending of money in this capacity will detract from the organisation's ability to conduct the functions for which it exists. This is doubly important because grants do not generally cover operating costs and therefore funding for such costs must be raised by the organisation.

- Do you foresee any risks in this approach?

The “risks” in this approach should not be any greater than already exists in relation to taxpayers, whereby the ATO adopts particular measures in order to determine what action needs to be taken in relation to a taxpayer’s compliance with the applicable taxation laws.

- What other transitional arrangements might be required?

The proposals assume that all charities and NFP organisations have websites. This may not be the case. Depending on what exemptions can be provided for the need to maintain a website, this situation where there may not be a website needs to be factored into the requirements. Granting an extension for the organisations to update websites may not be feasible if there are no websites to update.

There could be many reasons for there not being a website. For example, some charities and NFP organisations may be local and do not need to use a website for the conduct of their activities. Others may be specific purpose organisations which work with other organisations and, therefore, do not need a website.

Apart from the website issue, organisations need to be given time and assistance to change any procedures in order to comply with the new requirements as part of the transitional arrangements.

- Are there things the Department could undertake to assist charities with this transition?

The Department could assist charities and NFP organisations by conducting information and training sessions in readily-accessible locations to assist the responsible officers of charities and NFP organisations, as well as other participants in the operation of those organisations, in transitioning to the new requirements. This, in turn, may require a greater flexibility in the timelines for compliance by the charities and NFP organisations.

- What factors should be considered in relation to the timing of the new arrangements?

Not all charities and NFP organisations have the resources or capacity to fully comply with the new arrangements in the short-term. This needs to be factored in when setting timelines and determining what assistance is proposed to be given to the charities and NFP organisations.

It is important to note that there are many charities and NFP organisations which are operated solely by volunteers whose main interest is ensuring that the work of the charity or NFP organisation is able to continue to be carried on. Such volunteers may not be capable of attending to the necessary requirements under the new proposals without sufficient independent and impartial assistance being given to them. As can be expected, this may require substantial amounts of time for the measures to be able to be fully implemented as proposed.