

Name:

Organisation: UNITING CARE AUSTRALIA

Stakeholder category: NATIONAL NETWORK OF COMMUNITY SERVICE PROVIDERS

State/Territory: ACT

Contact email address:

### **Response to Options Paper Department of Social Services**

UnitingCare Australia represents the Uniting Church's network of UnitingCare community service providers operating nationally across more than 1,600 sites in metropolitan, regional and remote Australia. Our network is one of the largest providers of community services in Australia and we make a strong contribution to the Australian economy with an annual turnover in excess of \$2.5 billion, employing 39,000 staff supported by 28,000 volunteers nationally.

In making our assessment of the Options Paper we have been mindful of the important social and economic contribution that the charitable and not-for-profit (NFP) sector delivers to the nation and its place in civil society. In his 2011 speech to the Australian Council of Social Service National Conference Kevin Andrews, as Shadow Minister for Families, Housing and Human Services, stated that:

“The institutions of civil society are important because they are neither created nor controlled by the state. Public funding requires accountability and services require training, skills, and a professional approach, but it is important that the independence and the volunteering ethos of the sector is protected and encouraged. We should guard against unnecessary state control of the civil sector”.<sup>1</sup>

UnitingCare Australia supports this statement and believes that any new arrangement which reshapes the Commonwealth's relationship with civil society needs to reflect and recognise the foundations and rights of the charitable sector. In particular we believe that the independence, diversity and voice of charities should be protected and encouraged by those arrangements.

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<sup>1</sup> Speech to the Australian Council of Social Service National Conference, *Kevin Andrews MP*, 30 March 2011  
<http://www.acoss.org.au/images/uploads/Kevin%20Andrews%20-%20The%20Importance%20of%20Civil%20Society.pdf>

As the Department will be aware, the introduction of the *Australian Charities and Not-for-profits Commission (Repeal)(No.1) Bill 2014* has created significant uncertainty for Australia's charitable sector. The Options Paper states that it "outlines the proposed replacement arrangements for the reporting obligations of charities that will follow the abolition of the charities regulator" (p.1). Whilst we welcome the Department's work to bring clarity to regulation post-ACNC our overall analysis of the Options Paper is that the proposals presented are not sufficiently detailed or complete to enable a sound assessment of their likely impact on the UnitingCare network.

Further, we believe that there are a number of significant omissions in the paper. It does not address how the fundamental rights of charities and NFP's around their independence, diversity and right to advocate will be treated. Nor does it continue the current legislative commitment for regulation of the sector to be proportionate and appropriate with correspondingly defined enforcement powers being granted to regulators.

The current Commonwealth legislative framework used to regulate the sector was developed in consultation with the sector itself. Given the critical role of charities and NFPs within civil society it enshrined in law a framework to uphold the fundamental rights of charities and NFPs by committing the national regulator to:

- respect the diversity of the sector and the existing structures of entities;
- uphold the independence of the sector and support its right to political advocacy;
- and
- identify opportunities to reduce regulatory red tape.<sup>2</sup>

This framework is outlined in the Objects of the *ACNC Act 2012*. It currently helps to shape the relationship between the Commonwealth and the sector and is further supported by associated legislation such as the *Charities Act 2013* and the *NFP Freedom to Advocate Act 2013*. Accordingly we believe that any replacement arrangements must similarly commit, in law, the Commonwealth, relevant regulator(s) and oversight bodies to adhere to these important principles in their oversight function of the sector. In the absence of such legislative protection we believe that there is serious risk that the diversity, strength and independence of charities and NFPs will be eroded.

### **Comment on the individual options**

#### *Self-reporting*

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<sup>2</sup> Submission to the Senate Community Affairs Legislation Committee Inquiry into the Australian Charities and Not-for-profits Commission package of Bills 2012, *UnitingCare Australia*, August 2012, p.6

We note that in determining replacement arrangements the Government is seeking to achieve a balance between the need for public accountability and to cut red tape (p.3). UnitingCare Australia believes that the charitable sector must operate in a manner which is transparent and accountable to those in the community it supports as well as to those who support the sector through the donation of their time and money.<sup>3</sup> We do not believe that the proposed self-reporting option will improve public accountability or deliver a tangible reduction in red tape.

Fundamental to the current requirements for charities to report annually to the ACNC is the “report once, use often” principle, whereby the regulator is committed to maintain a searchable online register of all registered entities and to make the information it collates available to other government agencies. A key outcome of this arrangement is the development of a “Charity Passport”, a system that enables the regulator to electronically share data with authorised government agencies.

The proposals in the Options Paper will see the charities register removed from the public domain and archived. The public will no longer have a single point of reference to check the bona fides of charities. It will also require charities to maintain their own publicly accessible website, although many already do there is a significant number who do not and for whom this would be an expensive, burdensome and otherwise unnecessary task. For example, the Uniting Church in Australia has approximately 1,000 small charities and basic religious charities (BRCs) operating in NSW alone, of which 1 percent currently publish and maintain their own website, with many others having no need to do so. A church or small charity that provides meals and support to homeless people in a small community and which maintains personal relationships with all relevant clients, case workers and health professionals, has no need for an online presence. As such we believe that further consideration should be given to maintaining the charities register in the public domain rather than imposing the need for each charity to maintain their own website.

The information requested to be published online will not, we believe, help members of the public make fully informed decisions about the credibility of a charity. For example, there is no requirement to include information on registration as a charity and there is no proposed mechanism by which a non-compliant charity can be identified as de-registered.

We believe that further consideration should be given to the type of information requested and that its purpose for use by the government, and its value to the public be identified. The proposal that Government funding be one of the mandated self-reporting items is

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<sup>3</sup> Submission to the House of Representatives Economics Committee Inquiry into the Exposure Draft of the Australian Charities and Not-for-profits Commission 2012 and associated materials, *UnitingCare Australia*, July 2012, p.3

perplexing given that the Government already holds and publishes that information on its various websites. If self-reporting of mandated information is pursued as a mechanism for disclosure, then we strongly advise that further work be done in this area to ensure that the need and purpose of that information is clearly defined and understood.

The return of the requirement for those charities registered under the *Corporations Act* to report to ASIC is an additional requirement to the current arrangements and will reinstate an annual review fee. It is unclear if this will be additional to any reporting requirements of the ATO.

The Options Paper notes that consideration will be given to an exemption from separate reporting requirements for those charities that already make information publicly available through another Commonwealth regulator (p.3). We view this as being a significantly weaker arrangement than is currently in place as it does not commit the regulator to seek to reduce red tape by looking to also share and accept reporting prepared for State and Territory governments.

#### *Determining charitable status*

Under the replacement arrangements, responsibility for determining eligibility for charitable status will return to the ATO, with the ATO becoming the default regulator of the sector. The Options Paper assumes that any sensitivities about a return of previous functions to the ATO are based on a perceived conflict of interest between determining eligibility to concessions and raising revenue (p.5). The feedback we have received from across the UnitingCare network is that this assumption is overly simplistic and incorrect; as was indicated in the consultations and research that pre-date the establishment of the ACNC.

We believe that there is an identifiable conflict of interest which makes the ATO an inappropriate regulator for the sector. The ATO's primary function is to 'protect the revenue base' and not to administer 'tax expenditures'. It (necessarily) maintains a culture of privacy of tax information which is counter to the transparent environment in which charities seek to operate.

The ATO itself has previously stated that it is not the right organisation to determine charitable status:

It is also our view that administration would be better served by a single, independent point of decision making on definition leading to conclusions about

whether organisations are charitable or not-profit, such as occurs with the Charities Commission in the UK for example.<sup>4</sup>

The assessment and administration of tax status is just one requirement of a regulator for the charitable and NFP sector. As the Options Paper outlines there will need to be other organisations at Commonwealth, State and Territory level to regulate the sector in the absence of a national independent regulator (p.7). It is difficult to identify how a return to this fragmented approach to regulation will reduce the workload and red-tape for either government or charities nor how it will further public accountability.

Further, the Productivity Commission's 2010 landmark report into the contribution of the NFP sector recommended that:

The Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating the various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations.<sup>5</sup>

We believe that the Productivity Commission's recommendation remains valid and current and as such we do not support a return to the ATO being the regulator of the charitable and NFP sector.

If the government is committed to appointing the ATO as the regulator for the charitable and NFP sector then the new legislative framework for the oversight of the sector needs to oblige the ATO to exercise its powers in a manner which is proportionate and appropriate, as is the case for the ACNC under the current legislation. We believe that any new framework must also provide similar legislative protection of the rights of charities and NFPs with regard to their independence, diversity and advocacy. The development of a new legislation framework should be undertaken in close consultation with the sector.

The Options Paper presents two administrative options for the determination of charitable status, each of which would see the ATO as both the determiner of charitable status and reviewer of its own decisions. There is little difference between the intent of these two options and neither delivers the necessary separation that is required between decisions made about charitable status and decisions made about eligibility to charity tax concessions. We believe that this would be a significantly retrograde arrangement given that the *ACNC Act* currently includes a number of checks and balances to ensure that independent decision making is a hallmark of regulating the charitable and NFP sector.

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<sup>4</sup> Submission, Inquiry into the Definition of Charities and Related Organisations, *Australian Tax Office*, 2001, p.9

<sup>5</sup> Research Report, Contribution of the Not-for-profit Sector, *Productivity Commission*, 2010, p.152

To date the options presented by the Department for the ATO to regulate the charitable and NFP sector are far removed from the current arrangements which the majority of the sector (81%)<sup>6</sup> is in favour of retaining. If, despite the outcome of consultations to date, there is no option to reconsider making the ATO the regulator for our sector, then we believe that new legislative arrangements need to be put in place. We believe these must provide for independent decision-making and create a separation of powers between determining charitable status of an entity and eligibility to charity tax concessions. To achieve this we believe there needs to be:

- A dedicated function within the ATO which has a distinct identity;
- A statutory mechanism to separate decision making about charitable status from decision making about eligibility to charity tax concessions; and
- The introduction of legislative protections for the decision making process as are currently included in the ACNC Act – including provision for the distinction between charitable status and access to charity tax concessions, regard for independence, diversity and right to advocacy for charities and regard for the principles of proportionate and risk-based regulation and commitment to “report once, use often”.

### **Proportionate compliance framework**

It is not clear from the Options Paper which of the current ACNC enforcement and removal of responsible persons powers would move to the ATO or ASIC. Charities will be required to educate or re-educate themselves as to which of the many Commonwealth, State and Territory compliance regimes apply to them and to which organisation they are accountable to. It is likely they will need to comply with directions from several organisations. We believe that further details need to be provided to the sector to enable charities to assess the likely impact of this arrangement.

There is no detail as to whether the ATO will have a range of options, other than deregistration, available to it for addressing misconduct. We believe that the current ACNC arrangements provide a useful guide of what is appropriate and proportionate, particularly around the mechanisms for the regulator to provide warnings to charities. The ACNC provides a number of resources to help charities meet their compliance obligations and the Options Paper does not state how these important functions will continue.

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<sup>6</sup> News article, Charities voice overwhelming opposition to ACNC Repeal Bill, *Pro Bono Australia News*, 13 May 2014

The Options Paper states that compliance arrangements for self-reporting will focus on areas of “high risk”. However, there is no explanation as to what is deemed to be “high risk”. It is our experience that the ATO and most Commonwealth agencies are risk averse. The NFP sector operates in an inherently risky environment. UnitingCare social service providers work with vulnerable and at risk members of our society, often with limited and irregular funding, providing services where the private sector often chooses to be absent for reasons of cost and profitability. These ingredients shape the characteristics of an innovative, mission driven sector. Any new compliance framework must balance the needs of business-like accountability against the capacity to find solutions through innovation and risk and we suggest that the department works closely with the sector to identify a suitable risk framework that also aligns with government grants and procurement processes.

### **Transitional arrangements**

As previously highlighted, the Options Paper proposes that the charities register be removed from the public domain and archived (noting that it will be made available to other regulators including the ATO and ASIC if required). We believe that removing a publicly accessible register that gives all registered charities an online presence, which includes a mechanism (a single annual return) to populate the “Charity Passport” is a retrograde step. Once the register is archived it will be out of date and so using it as an information source for regulators becomes redundant. We recommend that the register be retained along with the associated mechanisms to ensure information remains current and can be shared with government agencies (the Charity Passport).

### **Regulatory Impact Assessment**

The Options Paper does not identify the expected benefits or costs of replacing the current regulatory framework with the proposed new arrangements. Therefore, we ask the Department to undertake a comprehensive Regulatory Impact Assessment of the proposed new arrangements as a necessary step in the reform process.