

ACNC Options Paper – confidential submission to DSS

Submitted by: Alice Macdougall, Herbert Smith Freehills

Alice Macdougall has specialised in Charity Law for 14 years and has provided advice on the reform processes as well as advice and assistance to numerous regulators, charities and peak bodies.

Email: alice.macdougall@hsf.com

1 Response to proposed reporting arrangements

The best method to achieve transparency and accountability for charities, donors, volunteers and all funding bodies (including government), is to have consistent reporting of activities, impact and financials which appear on one free and publically accessible register.

The current reporting reduced duplication by accepting a range of reports and working with other regulators for consistency and reduction in red tape. It enables the public to readily identify and access information on similar charities. For the charities it is easier to know when and what they have to report and to have a partially completed AIS sent to them for them to complete and send back. The information importantly included more than financial statements so as to give much needed information on activities.

The proposed reporting by DSS raises a number of issues and does not achieve transparency and accountability:

- How will the public know where to find the information? If no information is on the charity's website, how will they know which of the following apply:
 - There is a regulator they can go to to find the available information and which one?; or
 - the charity has not complied with its disclosure requirements (and whether the ATO is aware of this and following it up)?; or
 - the charity is not required to produce publically available financial reports (ie has a revenue of less than \$250,000)?
- A key issue with charity reporting is that the previous reporting, and presumably what the DSS is proposing the sector revert to, is focussed only on financials whereas reporting on the activities and impact is crucial to understanding a charity (and confirming entitled to tax concessions). This significant aspect should be retained if the DSS is to pursue a replacement reporting regime to the register.
- If some reporting is on the charity's website how will the public know it if it is up to date? How will the ATO know if it is being regularly updated? Will this be a condition of tax status and inserted in the tax legislation?
- Some regulators will require an application and payment to release information which will be a significant deterrent and disadvantage from the free and immediate access now provided on the register.
- For many charities it will present a new expense to address web design and possibly payments to a for-profit organisation to create, maintain and update a website.
- A further key issue is the move towards consistency of data and the ability to find, collect and analyse data from charities to assist policy making, funders and the

public. Will the new reporting requirements set out what and how the data is to be presented?

Any reinstatement of the financial reporting under the Corporations Act must delete the reference to DGR status as being relevant to the levels of reporting. This was not sound policy and was not reflected in the ACNC Act nor in any of the incorporated association requirements where tiered reporting has been adopted.

2 Determining charitable status

The DSS options paper does not explain whether the government proposes to discontinue with the concept of 'registered charity' which is different to a tax concession charity under the tax legislation. Will all the Commonwealth Acts which have been changed to refer to 'registered charity' revert back to 'charity' and leave it up to the various regulators and government bodies to determine the charitable status? This sounds like duplication and a burden given currently those other departments can rely on the ACNC register as to whether an entity is charitable. Determining charitable status will then be done by any government department which needs to make this assessment depending on the legislation it is charged with applying.

Before being able to consider the options more information is required as to the how the government will deal with the amendments in all Acts referring to registered charities and the Charities Act.

The ATO can only determine charitable status for tax purposes. The only option which guarantees independence in decision making is having the decision made by a body separate to the ATO. The options proposed just provide an extra layer for challenging decisions by the ATO.

If the government is committed to reducing the burden of regulation, then it should focus on consistency in the definition of charity throughout Australia and working with the States and Territories for consistency and reduction in compliance requirements. The definition of charity is important for more than federal tax reasons.

3 Compliance framework

The ATO can only regulate the federal tax legislation and the other regulators their own Acts. The main issue charities and the public have faced is multiple regulators and lack of clarity. One regulator represented simplicity and clarity for charities and the public and certainty that the focus is on maintaining public confidence and education.

The compliance approach suggested in the last paragraph of the DSS options paper is consistent with the ACNC's approach. But it will only apply to the ATO and ASIC, to the extent the government can direct them? It is not clear if the options paper is suggesting the ATO and APRA will be responsible for regulating governance or whether this will still sit with the numerous regulators depending on the type of entity and the place of establishment. It is not clear whether the ATO is to be primarily responsible for compliance regulation for all aspects of a charity's work – this may well present conflicts in interest similar to defining charities.

Does this means the governance issues (which are 41% of the complaints received by the ACNC in its first year) may not be dealt either at all or inconsistently if referred to the applicable regulator (which could be one of many)?

In addition to the above, the issues with the compliance framework suggested in the options paper include:

- Uncertainty as to which regulator would deal with the various aspects of charity regulation – concerning for both the charities and any person aggrieved – who does the public turn to;
- people may be reluctant to seek assistance in respect of a suspected compliance issue from the ATO;
- people will not know to make a complaint about governance or fundraising, for example, to the ATO, if this is in fact being proposed;
- will the ATO have the powers to disclose and work with other regulators including State regulators?
- the State and Territory Attorneys-General do not very often act on their regulatory powers over charities;
- the public may not be aware of any serious issues under investigation, or after, if this is not publically available.

Overall there will be a lack of co-ordinated compliance action aimed at ensuring public confidence is maintained in the sector and to encourage and enable the charities to understand and comply with all legal requirements (not just those relevant to tax status).

4 Transitional arrangements

The transitional arrangements are not as simple as un-doing what was done in the ACNC (Consequential and Transitional) Act 2012. The issues that come to mind (without spending much time in research) are:

- What will happen to ‘registered charity’ and ‘ACNC type of entity’ in all Commonwealth legislation now using these expressions, bearing in mind that this expression is not the same as a tax concession charity and ‘charity’ is now defined by the Charities Act?
- Will all of this be undone:
 - re-enabling charities to have sub-institutions without separate ABNs?
 - Re-instating charitable institutions and funds in Div 50?
 - Basic religious charities?
- The expressions ‘charitable institution’ and ‘charitable fund’ are very difficult to define and under the old provision different structures were required. If it is intended to bring this back then you would need to grandfather charitable funds which have been established in an incorporated structure rather than a trust since 2012.
- There will need to be careful consideration of whether to just go back to the previous section 150 of the Corporations Act and if so have a grandfathering clause or allow considerable time for charitable companies not using ‘Limited’ in their names as a result of the current section 150 to apply for registration of the name without Limited in it.

- ASIC will need to follow up many charitable companies to get the information to update its register as the same information has not been required by the ACNC eg registered address and company secretary details.
- If the reporting requirements are turned back on in the Corporations Act then the definition of small company limited by guarantee must be amended to delete any requirement that it not be a DGR.

It will be more possible to provide input once it is clear what changes will be made and draft transitional provisions are provided but it is not as easy as restoring the Acts to how they were before the ACNC. Many entities have made significant changes as a result of the ACNC, including religious bodies and so it would be burdensome if these were now required to be undone.

The sector has reform fatigue and are overwhelmingly against the roll back of the ACNC so if the government is to proceed with this exercise considerable transitional time must be given to the sector to re-acquaint themselves with the requirements and update their own compliance checklist and make any changes to reporting procedures and templates.

Alice Macdougall

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