



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:

Australian Securities and Investments Commission

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

Government

State/Territory: -

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Response to Options Paper:

1. Proposed New Reporting Arrangements
 - a. What changes would your organisation need to make to meet the new requirements?

Information sharing

We note that the Options Paper states: '*...consideration will be given to an exemption from separate reporting requirements where organisations already make information available through another Commonwealth regulator.*' It is unclear from the Options Paper how this exemption would apply. Where this proposal envisages sharing of information between government agencies, this would require all agencies interested in the information, including ASIC, to establish systems to facilitate this. This would require IT solutions to be put in place and would take considerable time to fully implement.

Financial Reports

The ACNC legislation¹ turned off the requirement to lodge financial reports with ASIC for companies registered as charities with the ACNC. We cannot see any reason why amending the law to turn the requirement to lodge back on would not work, subject to the comments below. ASIC would also resume monitoring and compliance functions related to this.

¹ *Australian Charities and Not-for-profits Commission Act 2012 (Cth); Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth); and Australian Charities and Not-for-profits Commission Regulation 2013 (Cth).*

Information gap

We note that currently companies registered as charities with the ACNC do not need to lodge financial reports for the years commencing on or after 1 July 2013 with ASIC. As ASIC does not hold these financial reports for the period between 1 July 2013 and when the requirement to lodge with ASIC becomes effective, there will be a gap in ASIC's register. An option for addressing this is to migrate financial reports, along with other data, lodged with the ACNC from the ACNC's database to ASIC. Migrating data will involve IT systems and labour costs.

Alternatively, a disclaimer could be added to ASIC company search extracts noting that the information for the company may be incomplete and that financials may not be available for the period. This could mean that the public will not have access to two years of financial reports for a charity and may not be a desirable policy outcome.

Exemption from providing financial reports

We note that it is being proposed that charities currently exempt from providing financial reports would retain that exemption (ie. small organisations and basic religious charities). The exemption from lodgement for small registered charities under the ACNC Act does not have a corresponding exemption under Chapter 2M of the *Corporations Act 2012* (Corporations Act). Options for addressing this include:

- Amending the Corporations Act to create a new class of exemption for small companies that are charities in line with the current ACNC legislation: in addition to legislative amendment, this would have an impact across multiple IT channels for ASIC and require time and resources to implement; or
- Removing the current exemption from lodgement for small registered charities and reinstating the financial report lodgement requirements that apply to all companies and applied to companies that are charities prior to the commencement of the ACNC legislation, noting that Chapter 2M of the Corporations Act also contains certain exemptions from reporting for small companies limited by guarantee.

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

Transitional provisions are desirable to allow ASIC to accept financial reports from charities that comply with ACNC, but not Corporations Act, requirements. Transitional provisions relating to the lodgement deadline for financial reports might also be required to give charities time to comply - the current last date for lodging financial reports with the ACNC is six months after the end of the financial year whereas the Corporations Act requires financial reports to be lodged within four months.

2. Proportionate Compliance Framework

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

We note that the ACNC legislation turned off certain Corporations Act directors' duties and obligations for charities. We cannot see any reason why amending the law to turn these duties and obligations back on for charities would not work, subject to the comments below.

b. Do you foresee any risks in this approach?

There is a risk that charities could fall through a 'regulatory gap' for the period in which they were subject to oversight by the ACNC. Charities will not be subject to statutory directors' duties or other obligations under the Corporations Act until the *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014* (Repeal Bill) comes into effect, at which time, ASIC has the power to take action against a breach of the Corporations Act that has occurred since the relevant legislative provisions applied. However, it is not clear how a breach of the governance standards that applied to charities prior to the Repeal Bill coming into effect will be dealt with, and which organisation would have the power to deal with a breach once the ACNC's jurisdiction is removed.

We recommend that:

- how reports of misconduct currently under investigation by the ACNC would be finalised should be considered; and
- how reports of misconduct which arise after the Corporations Act duties and obligations are reinstated, but which relate to conduct that arose prior to ASIC's resuming jurisdiction, are dealt with should be considered.

3. Transitional Arrangements

a. What other transitional arrangements might be required?

The number of companies and registered bodies that are currently 'flagged' as charities on our corporate register (ASCOT) is approximately 6,669. There is currently a potential data gap of 18 months on ASIC's registers for these 6,669 charities, which will grow to 2 ½ years by the time the Repeal Bill becomes effective. This is because charities are required to lodge information with the ACNC rather than ASIC and because the ACNC is not required to collect all the information required under the Corporations Act (eg. secretary details, directors' place of birth, residential address and registered office). Some of these data gaps will have flow on effects, for example:

- details of a company's registered office - effective service for certain statutory or court matters must be made on the registered office address reported to ASIC, which must be a physical address. Not having this information could prevent some statutory notices and originating process from being served.
- Public companies limited by guarantee are required to have a secretary under the Corporations Act. There is no similar requirement under the ACNC legislation. Consideration should be given to whether this requirement should be reinstated for charities that are public companies, in which case, transitional provisions may be required to enable charities time to comply. Alternatively, an amendment to the Corporations Act could be made to align it with the ACNC legislation.

If a policy decision is made that the company register should be updated to address this data gap, transitional provisions should expressly provide for ASIC to request historical or point-in-time information not currently collected by the ACNC, but which would otherwise have been required by the Corporations Act. Integrating this data into ASIC's register would incur additional IT and labour costs.

Where ASIC is required to collect information from a charity that they are not currently required to provide to the ACNC, consideration should be given to enabling ASIC to waive late fees that may be incurred while charities seek to comply with the new requirements.

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

We suggest that, as with any new regulatory regime, there should be a reasonable period between when the final form of the Act and Regulations are settled and the commencement of the reforms. This ensures that internal processes can be implemented ahead of any start date for the change. It also enables ASIC to issue appropriate guidance to assist the sector with understanding the change.

Timing should also take into account the resourcing and IT systems change requirements that will impact how quickly ASIC will be able to receive and integrate information received from the ACNC database into our registers, if required.