



Australian Government
Department of Social Services

Australia's Charities and Not-for-profits

CONSULTATION REPORT

December 2014



Introduction

On 4 July 2014, the Minister for Social Services, the Hon Kevin Andrews MP, released the *Australia's Charities and Not-for-Profits Options Paper* outlining the proposed replacement arrangements for reporting obligations of charities following the abolition of the Australian Charities and Not-for-profits Commission (ACNC).

This report provides a summary of consolidated feedback as it relates to the four elements outlined in the options paper:

- **Self-reporting** requirements to ensure public accountability for charities' operations.
- Returning **determination of charitable status** to the ATO with a framework in place to ensure independence of decision making.
- A **proportionate compliance framework** that would leverage existing powers.
- Appropriate **transitional arrangements** to provide certainty for the sector.

The purpose of the Options Paper was to seek feedback from charities and interested parties on the proposed replacement options, with feedback informing the replacement arrangements.

The Department of Social Services (DSS) conducted face-to-face consultations sessions from 10 to 24 July 2014. These were held across seven capital cities – Melbourne, Hobart, Canberra, Brisbane, Perth, Sydney and Adelaide. A total of 230 stakeholders attended the sessions, with some forums attended by over 40 participants. A copy of the consultation discussion questions is at Appendix A.

Written submissions were accepted by DSS from 4 July to 20 August 2014. A total of 88 submissions were received. The written submission template is at Appendix B.

The consultation process canvassed the views of a wide range of participants nationally, with over 290 organisations and interested individuals participating. Twenty-seven organisations provided a written submission and attended a consultation session. Participants represented the diversity of the charities sector in Australia, including small, medium and large charitable organisations, peak bodies, charitable trust managers and interested individuals. Participants also included representatives from government, education, legal and financial services sectors.

A breakdown of the attendance at the face-to-face sessions is as follows:

NSW	VIC	QLD	SA	WA	TAS	ACT	Total
67	35	36	11	47	9	25	230

A breakdown of written submissions, by organisation location, is as follows:

NSW	VIC	QLD	SA	WA	TAS	ACT	Cross Jurisdictional	Total
16	13	6	5	7	2	3	36	88

Self-Reporting

Self-reporting was a key focus for the consultations and written submissions. Main areas of consideration are outlined below.

Public Accountability

Striking the balance between the need for public accountability and reducing the regulatory burden on civil society organisations was highlighted as an issue, with concerns regarding the move to decentralised reporting being twofold:

1. loss of the efficiency and security provided by a 'one stop shop'; and
2. assuring the integrity and consistency of information provided to organisations and the public.

Other issues raised included:

- Security of independent websites and the protection of information – particularly for small organisations without resources and skilled IT staff.
- Privacy issues for organisations such as women's refuges or domestic violence services, which may require a greater degree of anonymity.
- Maintaining the integrity of information – how will self-reporting be monitored, enforced and verified.
- Information provided to the public must be consistent. Participants requested guidance on financial reports and other self-reporting elements.

Transparency

Transparency was highlighted as being:

- Important for ensuring appropriate accountability in respect to taxation and other benefits accorded to charities and not-for-profit organisations.
- Essential for maintaining public confidence in the sector; and
- Most readily achieved through consistent reporting of activities and financial information that appears on one free and publicly accessible register.

It was widely agreed that transparency through self-reporting could be achieved by:

- The encouragement of high quality annual reporting practices.
- The provision of additional information such as an annual summary of activities such as: the approved category of Deductible Gift Recipient (DGR) (if applicable), and a link to the Australian Business Register where current charity and DGR tax endorsements are recorded.
- Providing the ATO with the ability to conduct random audits on charities and not-for-profit organisations.

Risks highlighted by participants in publishing financial reports on organisations' websites as part of self-reporting requirements included:

- The disclosure of an organisation's growth strategy and commercial competence to competitors.
- Misinterpretation of an organisation's financial position by donors.
- Costs involved in segmenting accounts in high detail.
- Continued multiple reporting obligations to other agencies.
- Risk of non-compliance if individual Government contractual arrangements preclude the disclosure of funding information.

Reducing red tape

Key feedback on the proposed requirements suggested two views:

- The requirement to establish and maintain a website would impose a greater burden on some organisations.
- The proposed replacement arrangements would not cause additional burden or impacts on most organisations as the majority of organisations already provide information on their websites and they would be able to readily adopt the proposed self-reporting requirements.

To ease the burden, it was suggested:

- The Government could provide assistance or exemptions to small organisations or sponsor shared websites.
- Legislation be broadened to require self-reporting through a 'digital presence' rather than a website specifically, as a more cost effective alternative to website creation and maintenance.
- The ACNC portal should be retained, but moved to another department's website, for the charity sector to update and self-report.
- Only those charities meeting the definition of a 'reporting entity' under Statement of Accounting Concept 1 should be required to prepare full financial statements in accordance with the Australian Accounting Standards Board and the International Financial Reporting Standards.
- The information to be maintained on the website is only required to be updated in line with the reporting timeframes contained in the *Corporations Act 2001*.
- Any reports lodged currently should be considered sufficient for the proposed self-reporting requirements. For example, the Australian Higher Education Providers (Guidelines) prescribe the form of the financial statements including the necessary auditing and verification that is required approved by the Australian Government under the relevant Acts.
- All funding received from Government (Commonwealth, State and Territory, Local) could be provided by the relevant government departments at the end of each financial year in a suitable format for uploading, or consistently updated on the relevant department's website.

Determining Charitable Status

Under the proposed replacement arrangements responsibility for determining eligibility for charitable status would return to the ATO. The options paper proposed that a dedicated function be established within the ATO with responsibility for determination of charitable status and eligibility for related tax concessions. Two different models were proposed:

Option 1: Establish an independent panel made up of external experts who would provide advice on objections raised by charities that disagree with the initial ATO assessment on the determination of charitable status.

Option Two: Form a separate area within the ATO that would be responsible for determining outcomes for applicants who objected to findings on eligibility for charitable status and related tax concessions.

ATO representatives at the consultation sessions acknowledged that there is a perception within the charity sector that the ATO is primarily concerned with "revenue collection". In response, the ATO representatives clarified that:

The role of the ATO is to administer tax law. One by-product is to administer revenue. Another product is to make decisions on charitable status. These decisions are made based on the law not on revenue considerations.

Regarding the establishment of a dedicated unit within the ATO to address the needs of the charities sector, it was stated that:

- A dedicated unit would help alleviate previous concerns and address the needs of the charitable sector.
- The dedicated unit within the ATO would have key advantages in developing and extending the body of knowledge in this specialist area and provide consistency of decisions.
- The unit's functions could be extended to include: the provision of advice; information and training; the maintenance of a register of charitable organisations; and the issuing of authoritative up-to-date certificates regarding charitable status.
- The ATO should adapt the ACNC's approach of service delivery such as: case management by staff who are familiar with the sector, personal assistance through processes, and clarity of communication without the use of lengthy and technical regulatory guidance.

It was widely agreed that independence is of central importance when determining eligibility for charitable status and related tax concessions but there were wide-ranging perspectives on the two options provided in the options paper:

Option 1

It was commonly agreed that the independent panel:

- Be bound by the principles of procedural fairness in its process, akin to other alternate dispute resolution processes.
- Be underpinned by administrative and legislative safeguards to ensure it is an empowered decision making body that can effectively reduce unnecessary processes and provide timely responses.
- Has the advantage of being able to seek experienced people and information from relevant bodies for example, the Office of the Registrar of Indigenous Corporations (ORIC) or the NCE, to refine understanding of specific entities and situations.
- Be established, resourced and overseen externally to the ATO. The panel should not include ATO staff members. Rather ATO staff be limited to provide information and assistance to the panel as required. Some participants nominated DSS as the preferred agency to house an independent panel responsible for the registration and monitoring of charities.

The risks associated with *Option 1*, as highlighted by participants, included:

- The panel would only have an advisory role and in reality be consultative and non-binding.
- This option structures the appeal process over three tiers and therefore is likely to be bureaucratically cumbersome and unlikely to be able to deal with appeals in a timely manner.

Option 2

It was commonly agreed that:

- *Option 2* does limit the possibility of conflict of roles involving assessing charities and providing a right of review, but further exploration of this option is required to ensure it is established as a robust and independent appeals process with adequate oversight arrangements.
- Important aspects in establishing a separate, but notably independent, area within the ATO include:
 - standing delegations and accountability – for example, critical / disputed cases to be decided by the Taxation Commissioner;
 - proportionate and appropriate powers;
 - quick turnaround times for the appeal process; and
 - continued action to preserve legislative protection for the independence, diversity and the right to political advocacy for the sector.
- The ATO previously had a separate area that was very professional, helpful and consistent.

A limitation of *Option 2*, as highlighted by participants was that it would not be independent if staffed by ATO staff members. It was stated that 'Chinese Walls' are not an effective way to stop the flow of information or conflicts of interest within an organisation.

Other comments on the options regarding the determination of charitable status included:

- Both options would necessitate more time and resources on the part of all involved, rather than achieving the goal of building independence into the determination decision. In response to this, it was suggested that a panel of experts who would make initial decisions relating to charitable status should be established.
- The two options present a good framework for the oversight of the administration of charities and not-for-profit organisations. However it should not be an either/or choice between the two, but rather a combination of the two options.
- Cost should not be a barrier to applications or review. It was stated that the current online application process has been working well.
- Legislation which is to be applied by the decision-maker 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.
- Enabling the Administrative Appeals Tribunal to review decisions adds complexity and cost to the process.
- There is a risk that the appeals processes will focus on administrative issues related to how decisions are made, rather than the merit of the decision itself.

Proportionate Compliance Framework

Feedback emphasised the support for the Government's requirement for proportionate compliance arrangements being simple and efficient and ensuring appropriate accountability for Commonwealth funds and activities that benefit from tax concessions. The need for transparency and the monitoring, verification and enforcement of self-reporting by charities was raised as a key issue.

In addition graduated responses to non-compliance, monitoring and enforcement arrangements and the harmonisation of compliance across multiple regulators and jurisdictions, were emphasised as important elements of a proportionate compliance framework. Comments about these elements included:

Graduated responses to non-compliance

- The compliance framework established for the ACNC, which allowed graduated responses, should be maintained.
- The graduated approach allows for a range of interventions – warnings, undertakings, and injunctions – which suits the sector, and it's many small organisations, which may experience issues resulting from a need for further education rather than malicious intent.
- A graduated approach would avoid enforcing a 'one-size-fits-all' approach onto a sector comprised of diverse organisations with varied compliance and support needs.
- A 'regulatory approach' document should be developed by the dedicated unit within the ATO to assist charities to understand how the ATO proposes to approach its role and responsibilities when it comes to determining eligibility for charitable status and, in particular, the manner in which the proposed proportional compliance framework will be administered.

Monitoring and enforcement arrangements

- The success of the compliance framework largely depends on the ability of the responsible agency to monitor and review the compliance and conduct of charities.
- There is a need for professional standards to be in place in relation to industrial and governance arrangements and professional practice with clients, in recognition of the increasingly complex nature of the sector's work and the need to protect public faith and trust in the sector.
- In order to protect public faith and confidence, careful planning is needed to address the rare cases of serious wrongdoing in instances of both wilful non-compliance and gross negligence.

- Instances of self-reporting are not thought conducive to adequately addressing the inherent non-compliance risk. In order to ensure compliance with the self-reporting requirements some suggestions were made including random audits by the ATO or appropriate 'culpability' provisions brought into the tax regime governing tax exempt status (much like the Superannuation Industry Supervision legislation uses to handle non-compliance with operating standards).
- It was suggested that this proposal is 'reactive' rather than preventative as the stated authorities would be responding to potential misconduct, rather than monitoring compliance and charities' activities in a preventative manner.

Harmonisation of compliance

- The decentralisation of powers in relation to information collection, monitoring and compliance to a number of regulatory bodies - for example ASIC, ATO and State and Territory governments – may lead to different interpretations by various regulatory bodies, potential overlap in powers; as well as uncertainty about the relevant and appropriate regulatory body.
- Inconsistency across circumstances and inconsistent compliance obligations based on State and Territory legislative frameworks would not provide an appropriate or proportionate compliance framework, and would burden charities with additional obligations.
- The Commonwealth should further the deregulation agenda and investigate reform, such as mirrored legislation for each State and Territory, allowing consistency while retaining State and Territory autonomy.
- If directors' duties return to arrangements under the Corporations Act, strong consideration needs to be given to how not-for-profit directors (acting honestly and with an appropriated degree of care and diligence) can be protected from the risk of personal liability so as to not discourage their contribution. A suggestion was made to insert an overarching Honest and Reasonable Director Defence into the Corporations Act, allowing directors the 'safe harbour' they need to focus on the best interests of the charity. Also suggested was the move to create consistency of directors' duties and governance standards across the three entity categories through legislating on a new form of charitable incorporated organisation.
- State and Territories laws have been widely criticised for being out-of-date and no longer fit-for-purpose. State and Territory regulators are under-resourced and often lacking specific expertise in charity and not-for-profit issues.
- A loss of cross-jurisdictional powers of the ACNC may lead to an increase in unscrupulous activity crossing state borders with little transparency and the impost of fines for non-compliance on small organisations who are non-compliant through a need for greater assistance and education rather than wilful intent.

Transitional Arrangements

The feedback on transitional arrangements emphasised the importance for more communication, including:

- greater clarification on many elements of the proposed replacement arrangements;
- guidance on what self-reporting will look like, including templates;
- an education roll-out for both the sector and the public;
- face-to-face training and information sessions for the sector;
- information to be disseminated on all relevant agencies' websites; and
- the dissemination of information as often and as early as possible.

Other suggestions to assist charities and not-for-profits transit to the new regulatory framework included:

- Establish a program of grants made available to charities and sector-support services, to assist with establishing and maintaining an appropriate website to comply with self-reporting requirements, including assistance with ongoing maintenance, updating and security of data.
- Strong information sharing between the regulatory agencies, and other peak bodies who can work to assist their members.

The timing of new arrangements is an important element of transition for stakeholders. Issues for consideration included:

- timing of the legislation and the current ACNC reporting period;
- the need for a lengthy implementation, particularly for smaller organisations;
- the calendar versus financial year;
- time allowances for organisations that need to amend their constitutions and governance procedures; and
- the implementation of a phased approach to transition to accommodate the different reporting requirements for the various types of charities.

General Comments and Concerns

A number of general views were presented in the consultation process that did not directly relate to the elements outlined in the Options Paper, but will contribute to the Government's consideration of replacement arrangements.

- Many stakeholders spoke of the benefits of having a dedicated charities regulator which understood their sector and had the resources to educate and support charities.
- A clear distinction needs to be made between the principles of charity and not-for-profit regulation currently in place, and the regulatory mechanism of the legislation itself. Any alternative arrangements should be underpinned by these principles, that is: reduction in red tape; minimising reporting requirements; and enhancing transparency in relation to the operation of charities.
- Criticism was raised of the consultation process with a concern that the Government had already made up its mind on the form of the replacement arrangements.
- Strong support for the Government to reduce red tape across all levels of government, including through the harmonisation of fundraising laws. DSS or the NCE could take a lead role in this work.
- Strong support for retaining the Charities Register or a form of public register. Suggestions of alternatives included: the Australian Business Register (ABR), the ASIC website, or a database using cloud technology.
- Retention of the data collected by the ACNC was a key issue. A focus was the retention of register data and that the data remain accessible to the public. Consistent formatting for the self-reporting requirements is considered important for aggregation and comparison of data.

- Some stakeholders expressed confusion about the link between the consultation on the ACNC replacement arrangements and the Civil Society National Centre for Excellence (NCE) consultation process. In the consultations, DSS staff clarified that:

The NCE will not be a replacement for the ACNC. It will not have regulatory functions. The Australian Government has committed to establish a NCE that will operate independently of government to enhance the institutions of civil society. This may occur through supporting collaboration, innovation, education, training and advocacy, and working to reduce reporting requirements and red tape.

The consultation process highlighted some issues that were not addressed in the Options Paper, including:

- How the fundamental rights of charities and not-for-profit organisations around their independence, diversity and right to advocate will be treated.
- The impact of stringent corporate governance demands on encouraging people to serve on boards and committees within the civil sector.
- The breadth and depth of reporting exemptions for different organisations across jurisdictions.
- Upon what basis the determination of charitable status will be made, either the current legislative definition of charity or a return to the common law definition.
- The regulation of charitable trusts – there is concern from some in the sector that there is not enough transparency in this area. While others support the development of clear boundaries around the charities and not for profit sector, to ensure that service providers to the sector – trustee companies and public trustees – are not encapsulated in the new regulatory arrangements.

Next Steps

Analysis of the feedback obtained through the consultation process will inform the development of the replacement arrangements and drafting of the *Australian Charities and Not-for-profits Commission (Repeal) (No.2) Bill 2014*, to be introduced later this year.

DSS will also consult on the exposure draft of the legislation and will seek feedback from subject matter experts, such as charity law experts and sector advocates.

Appendix A

Discussion Questions

Self-Reporting

1. Do you believe that these proposed requirements will be less time consuming than current requirements?
2. What changes would your organisation need to make to meet the new requirements?
3. Do you foresee any impediments to charities complying with these requirements?
4. Do you believe these requirements will provide transparency? If not, what changes would you make?

Determining Charitable Status

Option 1: Independent Panel

Option 2: Separate area within the ATO

5. Which of these options do you believe best guarantees the independence of the decision making process?
6. Are there any other considerations that should be taken into account when these functions are undertaken?

Proportionate Compliance Framework

7. Are there any reasons why this approach may not work?
8. Do you foresee any risks in this approach?

Transitional Arrangements

9. What other transitional arrangements might be required?
10. Are there things the Department could undertake to assist charities with this transition?
11. What factors should be considered in relation to the timing of the new arrangements?

Appendix B

Written Submission Template

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.

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.

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.

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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

If submitting on behalf of a company or organisation

Name of organisation: Organisation name (if applicable)

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

State/Territory:

Contact email address:

Response to Options Paper: