



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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Response to Options Paper:

General comments

The Options Paper proposes significant changes to the regulation of the charities sector. The sector has only recently been subject to fundamental changes in its regulation. The government is now proposing that the sector, which is under-resourced and largely volunteer-staffed, should implement further changes. We are strongly of the view that this will cause significant confusion in the sector. A number of issues will arise from this confusion:

- unless sufficient time is granted to the sector to accommodate the changes, the attention of senior members of staff will be turned to seeking to understand and meet their new obligations, which will divert them from attending to their responsibilities to provide charitable services
- without a clear line of communication from the government to each and every charity, the majority of charities are likely to:
 - not have any knowledge or understanding of the changes to their regulatory framework, and
 - be unable to implement the changes proposed in the Options Paper.

Governance Institute strongly recommends that the government provide step-by-step instructions to each charity currently registered on the Charities Register as to:

- what regulatory changes will occur and when
- what it will mean for each type of charity
- what each charity needs to do, and
- where each charity can go for assistance.

1 Proposed new reporting arrangements

We note that self-reporting is not necessarily effective in providing the accountability and transparency that donors, members, volunteers, funders and the general public seek when interacting with charities. In particular, small charities are likely to be unclear as to how best to facilitate self-reporting. Charities will require from the Department significant guidance and direction as to:

- what self-reporting entails, including templates for suggested good practice on providing the information required on websites in relation to:
 - the names of responsible persons
 - details of all funding received from government, both Commonwealth, state and local, and
 - financial reports

For example, those charities that are companies limited by guarantee will require a table showing which provisions of the Corporations Act will be 'switched on' again.

- why the regulatory changes were introduced and why providing this information increases accountability and transparency and therefore assists the interaction of all stakeholders with the charity and develops trust that the charity is fulfilling its mission.

Charities will also require clear instructions as to which of the following government agencies they can contact to answer any queries in relation to self-reporting, to find guidance and when these agencies will become the 'lead agency':

- the Australian Securities and Investments Commission (ASIC)
- the Australian Taxation Office (ATO)
- the proposed National Centre of Excellence
- the Department of Social Services
- state government agencies (for incorporated associations).

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

It is difficult to determine any accurate response to this question or any of the other questions set out in the Options Paper, as it depends on the regulatory regime with which each particular charity must comply. For example, those

charities that are companies limited by guarantee and that will be regulated by ASIC may see a significant increase in compliance obligations, which will inherently be more time-consuming. For example, such charities will revert to having to conduct a statutory AGM, which previous consultation identified as being of doubtful value and an unjustified cost and time imposition on many charities. The provision of a clear and focused educational campaign accompanied by detailed instructions relevant to each regulatory regime with which charities must comply will assist in reducing the time allocation required by charities to meet their self-reporting obligations.

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

Governance Institute of Australia is a charity that is also a company limited by guarantee and will need to assess which provisions are 'switched on' again under the Corporations Act before being able to respond to this question. We may need to engage legal advisers, particularly as our compliance obligations are expanding, but possibly also to make sense of what we are meant to do. This will be time-consuming and expensive.

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

Please see our comments above about the confusion that will be created in the sector.

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

A self-reporting regime was in place prior to the establishment of the ACNC. The reporting was highly variable in quality and depth and is likely to be so again with a return to this regime. The Charities Register is one of the most important features of the current regulatory system. It provides and promotes transparency and accountability by allowing all stakeholders who wish to donate, volunteer and be involved with charities easy access to information about the identity and operation of every charity and provides comparability. National collection of data on the charities sector also ensures that its vital contribution to Australia can be recognised and policy decisions made about the sector can be properly informed and considered.

Governance Institute strongly recommends that the government develop guidelines and templates suggesting good practice for self-reporting to:

- provide the guidance and directions charities seek in relation to self-reporting
- encourage consistency and quality of self-reporting
- allow for comparability which will increase transparency
- allow for the national collection of data on a charities register.

Governance Institute also recommends that the government collate reporting provided to a range of regulators so that donors, volunteers and the public can access easily all reporting by charities. A centrally maintained register of charities and reporting is the best means of providing accountability and transparency.

2 Determining charitable status

The ATO lacks independence and has a conflict of interest because:

- it is set up to collect tax revenue on behalf of the government and
- therefore any determination of charitable status is inherently conflicted by its charter because
- the determination of charitable status consists of determining access to tax concessions.

The Options Paper mentions the conflict of interest to which the ATO is subject. However, neither option set out in the Options Paper adequately responds to the ATO's lack of independence, which makes it unable to manage this conflict of interest and unable to determine charitable status independently.

Option 1 sets out a proposal for an appeals panel. It does not address adequately concerns about the independence required to properly undertake assessment and determination of charitable status or that any assessment process by the ATO is inherently conflicted. Appeals can only be heard after an assessment and determination process. Moreover, charities will be required to incur time and cost expenses in order to appeal a conflicted assessment process. The ATO's conflict of interest is not addressed adequately by Option 1.

Option 2 proposes a 'Chinese Wall' within the ATO. 'Chinese Walls' are not an effective way of stopping the flow of information or conflicts of interest within an organisation, which is why a separate, independent body is required for determining charitable status. Moreover, the membership of the appeal group will consist of members of the ATO who by the nature of their employment will hold a subconscious assumption that the ATO is probably correct in its assessment. The ATO cannot be independent in the process of determining charitable status, with or without a 'Chinese Wall'. The ATO's conflict of interest is not addressed adequately by Option 2.

3 Proportionate compliance framework

The proposed changes set out the Options Paper do not create a compliance framework. With self-reporting, there is no dedicated supervising body assessing if the reporting meets any compliance obligations. This is an essential component of a compliance framework.

Various threshold issues relating to a compliance framework are not addressed in the Options Paper:

- If a donor, or a volunteer, or a member of the public is concerned about a charity and whether it is fulfilling its mission in its expenditure of funds, or being prudently managed, who can they contact to register concern if there is no supervising body? For example, we refer to the recent media attention on the NSW-based registered charity and religious group Christian Assemblies International (CAI), where allegations of abuse of power and funding were made by members. The ACNC has pledged to investigate the allegations.
- If there is 'wilful non-compliance', who determines who is in breach of the self-reporting obligations? Without any templates for reporting, who determines if self-reporting is adequate or otherwise? Who supervises self-reporting?

These are not minor considerations but go to the heart of preserving trust in the charities sector. Overwhelmingly, registered Australian charities are honest, professional and deserve public support, but the ACNC has dealt with more than 900 complaints or concerns about charities since its inception in December 2012. While most of these have been resolved with education and advice or cooperative intervention by the ACNC, the question remains as to how public trust is to be maintained if the public has no supervising body to refer to if self-reporting is inadequate or raises concerns.

4 Transitional arrangements

The Options Paper appears to suggest that a dual compliance regime has now been introduced for all charities, with an ambiguous statement that the reintroduction of ASIC and the ATO to the regulatory framework has already come into effect, yet the ACNC Act continues to operate. This will cause great confusion in the sector, and it is likely that charities will assume that a dual compliance regime has been introduced. This is an extremely challenging and complicated regulatory framework that charities must navigate. Further, given that the change may occur mid-period in terms of a charity's reporting year, it is unclear if the charity has to retrospectively comply with the new relevant authority or have reporting obligations to dual authorities for a transition period.

a) What other transitional arrangements might be required?

The most important question is: Under what legislative framework is the Options Paper suggesting that ASIC and ATO compliance obligations have been or will be reintroduced? A second important question therefore is: Will charities need to seek expensive legal advice to assist them to understand whether they do in fact have any compliance obligations in relation to ASIC and the ATO, given the Paper appears to suggest that this is in place as of now? **Governance Institute** recommends that the government release information on the legislative underpinnings to the statement that the ATO, ASIC and other regulators have been or will be reintroduced to the regulatory framework.

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

The Department needs to urgently issue a clear and focused educational campaign accompanied by detailed instructions relevant to each regulatory regime to which charities will be subject, providing step-by-step instructions on what each type of charity needs to understand and do, and the legislative framework under which such obligations arise. The statement in the Options Paper that the new arrangements for regulators such as the ATO and ASIC will take effect straight away, without any accompanying advice on the legislative underpinnings of this statement, will create significant confusion, as charities are likely to believe that a dual compliance regime has been introduced. The lack of clarity as to what charities need to do to navigate the changes set out in the Options Paper introduces unprecedented uncertainty to the sector. **Governance Institute recommends** that the Department issue detailed communication and instructions to the charities sector.

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

The pace of implementation of the proposed changes and the likely consequences for an under-resourced and largely volunteer-staffed sector of not being able to understand the process of change or its implications for their own compliance appears to create a real risk that the process will in fact fail to meet its objective, and in particular fail to reduce red tape.

Governance Institute strongly recommends providing at least one year from the enactment of the legislation repealing the ACNC to allow charities sufficient time to consider and comprehend the changes set out in the Options Paper, then understand and implement the step-by-step instructions yet to be issued by the Department (and possibly other regulators). To do otherwise risks imposing new and potentially unnecessary compliance costs on an already overburdened sector.