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Civil Society and Programme Delivery Policy Branch  
Department of Social Services  
PO BOX 7576  
Canberra Business Centre, ACT 2610

By email: [consultationwithcharities@dss.gov.au](mailto:consultationwithcharities@dss.gov.au)

Dear Sir/Madam,

***Consultation on Australian Charities and Not-for-profits Commission  
Replacement Arrangements***

Please find attached Philanthropy Australia's submission in response to the consultation on the proposed Australian Charities and Not-for-profits Commission replacement arrangements.

If the Department of Social Services wishes to discuss the matters raised in this submission further, please do not hesitate to contact Krystian Seibert, Policy & Research Manager, on (03) 9662 9299.

Yours Sincerely

A handwritten signature in black ink, appearing to read "Louise Walsh".

Louise Walsh  
**Chief Executive Officer**

# Philanthropy Australia Submission – Consultation on Australian Charities and Not-for-profits Commission Replacement Arrangements

## 1. Introduction

Philanthropy Australia is the national peak body for philanthropy and is a not-for-profit membership organisation comprising more than 800 Members and Associates. These include trusts and foundations, businesses, families and individuals who want to make a difference through their own philanthropy and to encourage others with their giving. Our vision is for 'A More Giving Australia' and our mission is to 'Lead an innovative, growing, influential and high performing philanthropic sector in Australia.'

Philanthropy Australia recognises the important work undertaken by the Australian Charities and Not-for-profits Commission ('ACNC') since its establishment. The ACNC has engaged effectively with the broader NFP sector, and has adopted a supportive approach to helping charities understand the new regulatory framework.

However, Philanthropy Australia acknowledges that the Australian Government has made a commitment to abolish the ACNC. Therefore this submission seeks to provide constructive feedback on the options contained in the Department of Social Services' Options Paper *Australia's Charities and Not-for-profits* ('Options Paper').

Philanthropy Australia understands that there will also be public consultation on draft legislation prior to the introduction of any legislation into Parliament. It is critical that stakeholders be provided the opportunity to examine the detail of proposed arrangements as set out in such draft legislation, and Philanthropy Australia looks forward to the opportunity to do so.

## 2. General Comments

Philanthropy Australia's position regarding the Australian Charities and Not-for-profits Commission is set out in its submission to the Senate Economics Legislation Committee inquiry into the *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014*.<sup>1</sup>

Philanthropy Australia does not propose to discuss this position in detail again in this submission. However, the key points of Philanthropy Australia's position are that:

- We caution against trying to address real or perceived issues with the ACNC regulatory framework by simply abolishing the framework in its entirety without a more systematic assessment and examination of the different aspects of the framework

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<sup>1</sup> See: [http://www.philanthropy.org.au/images/site/blog/Philanthropy\\_Australia\\_Submission\\_-\\_Australian\\_Charities\\_and\\_Not-for-profits\\_Commission\\_\(Repeal\)\\_\\\_\(No\\_1\)\\_Bill\\_2014.pdf](http://www.philanthropy.org.au/images/site/blog/Philanthropy_Australia_Submission_-_Australian_Charities_and_Not-for-profits_Commission_(Repeal)_\_(No_1)_Bill_2014.pdf)

- We do not believe that the policy debate should be structured as a narrow and limited choice between the retention of the ACNC or a return to the pre-ACNC status quo, where the Australian Taxation Office ('ATO') was the de-facto regulator of charities at the Commonwealth level
- We would encourage the retention of the parts of the framework which are working effectively, even if the ACNC itself is not retained

Philanthropy Australia has developed three principles to guide its approach to discussions about the future of the ACNC, which serve to outline the key elements that Philanthropy Australia considers relevant when examining any changes to the regulatory framework for charities at a Commonwealth level.

These principles are:

1. An independent government body, separate from the revenue collection body, should be responsible for determining charitable status and maintaining a national register of charities
2. Addressing the regulatory burden on the NFP sector should be a reform priority for all levels of Government
3. Better information about charities, including philanthropic organisations, is needed to improve our understanding of their role in the community and assist with policy development

With reference to Principle 1, Philanthropy Australia notes that the Options Paper proposes to return the function of determining eligibility for charitable status to the ATO. In addition, there is no proposal to retain some form of national register of charities.

Philanthropy Australia believes that having an independent government body, separate from the revenue collection body, which is responsible for determining charitable status, represents an optimal regulatory arrangement and is consistent with international best practice.

Furthermore, Philanthropy Australia believes that a national register of charities is an important resource for assisting donors as well as the wider community. This is because it makes information more easily accessible and therefore enables donors to make more informed choices about the organisations they support.

Therefore, Philanthropy Australia would encourage reconsideration of the proposed ACNC replacement arrangements, to more closely reflect the Principles outlined above.

#### **Recommendation 1**

***That the ACNC replacement arrangements be based around having an independent government body, separate from the revenue collection body, which is responsible for determining charitable status and maintaining a national register of charities.***

### **3. Proposed New Reporting Arrangements**

Philanthropy Australia welcomes the Government's desire to achieve a balance between the need for accountability and transparency, and a commitment to not burden organisations with unnecessary reporting obligations.

High standards of accountability and transparency serve the broader interests of the not-for-profit sector as well as the wider community.

Although 'self-reporting arrangements' are proposed as a way to achieve the Government's objective, Philanthropy Australia believes that such arrangements would be difficult to implement in a manner that meets this objective.

#### **Challenges with 'Self-reporting Arrangements'**

Not all charities would have their own websites on which to report the necessary information set out in the Options Paper. This would include many of Philanthropy Australia's Members.

Where a website is not needed for any other purpose, establishing one just to report required information would represent an additional regulatory burden.

In addition, adequately enforcing such a requirement would be very challenging and potentially resource intensive.

There are currently over 60,000 registered charities in Australia. Allowing for some exemptions from self-reporting requirements as discussed in the Options Paper, this would still mean that tens of thousands of charities are likely to need to maintain websites which make the required information available.

If self-reporting requirements are not adequately enforced, the objective of achieving an acceptable level of transparency would not be achieved. This would call into question the purpose of the requirements in the first place, in which case it may be better to not impose the requirement at all but rather allow charities to voluntarily report information should they so choose.

#### **Alternative Reporting Options**

Given the challenges with the proposed self-reporting arrangements, Philanthropy Australia believes two options would merit consideration and would assist in achieving the Government's objective.

##### *Retaining Some Form of National Register of Charities*

One of the benefits of a national register of charities is it does not require charities to maintain their own website in order to report. It also supports enhanced transparency through the aggregation of information about charities in one easy to access website, and assists donors to make more informed choices about the organisations they support

Such a national register of charities could be more limited than the existing ACNC Register, and be based around charities uploading a limited set of required information once a year. Such an arrangement would also make enforcement of any reporting requirements much easier to undertake.

The retention of a national register of charities is Philanthropy Australia's preferred way forward.

## **Recommendation 2**

***That some form of national register of charities be retained to facilitate easier reporting by charities and provide better access to information by donors and the wider community.***

### *Introducing a More General Requirement to Provide Information*

Alternatively, rather than requiring charities to self-report through their own website, a more general requirement could be introduced whereby charities would need to provide certain information where requested by members of the public.

This would be a more flexible requirement than that proposed in the Options Paper, as charities could choose to provide this information on their website or if it is not regularly requested of them, other arrangements could be made.

This requirement would not apply to Private Ancillary Funds ('PAFs'), which would continue to report to the ATO as per the existing requirements of the *Private Ancillary Fund Guidelines 2009*. This reporting framework ensures that PAFs are appropriately accountable to the ATO, whilst providing privacy protections for individuals and families who wish to be discreet in how they undertake their giving.

### The Need for Further Clarification of Proposed Reporting Arrangements

Philanthropy Australia recognises that as the ACNC replacement arrangements are currently the subject of consultation, the full details of the arrangements are not yet finalised.

However, Philanthropy Australia has identified a number of areas of particular relevance to our Members where further clarity is necessary.

#### *Private Ancillary Funds*

PAFs currently provide certain information to both the ACNC and the ATO. Privacy protections are currently in place under the ACNC regulatory framework to ensure that as part of this process, neither the ATO nor the ACNC discloses any information which could lead to the identification of individual donors.

Philanthropy Australia presumes that should the ACNC be abolished, PAFs would continue to report to the ATO as per the existing requirements of the *Private Ancillary Fund Guidelines 2009*.

However, Philanthropy Australia would be very concerned if there were any additional requirement to publicly disclose information on a website or in another manner. This could lead to the identification of individual donors, and therefore act as a disincentive to giving.

The annual reporting framework under the *Private Ancillary Fund Guidelines 2009* ensures that Private Ancillary Funds are appropriately accountable to the ATO.

It is critical that in the case of PAFs, effective and practical privacy protections are retained which recognise that individuals and families may wish to be discreet in how they undertake their giving.

### *Public Ancillary Funds*

Public Ancillary Funds are currently required to provide certain information to both the ACNC and the ATO.

Philanthropy Australia presumes that should the ACNC be abolished, Public Ancillary Funds would continue to report to the ATO as per the existing requirements of the *Public Ancillary Fund Guidelines 2011*.

However, as the information provided to the ATO is not publicly available, clarity is sought regarding what information would be required to be made publicly available as part of any self-reporting proposals.

### *Charitable Trusts*

Charitable trusts established by a will or deed are currently required to provide certain information to the ACNC under its reporting framework, but generally do not report to any other regulatory body. The exception to this is Private and Public Ancillary Funds, which have reporting requirements to the ATO as discussed above.

Clarity is sought regarding what information would be required to be made publicly available by such charitable trusts as part of any self-reporting proposals.

### *Financial Reporting by Small Charities*

Charities with annual revenue of under \$250,000 a year are not required to submit audited or reviewed financial reports to the ACNC.

However, such charities are not entirely exempt from financial reporting arrangements.

This is because from 2014 onwards they will be required to submit some basic financial information through the 'Annual Information Statement'.

Clarity is therefore sought regarding what information would be required to be made publicly available by small charities as part of any self-reporting proposals.

### ***Recommendation 3***

***That clarity is provided regarding proposed reporting arrangements for Private Ancillary Funds, Public Ancillary Funds, Charitable Trusts and small charities.***

***It is critical that effective and practical privacy protections for Private Ancillary Funds are in place under any new reporting arrangements.***

### **4. Determining Charitable Status**

Philanthropy Australia notes that under the proposed ACNC replacement arrangements, responsibility for determining eligibility for charitable status will return to the ATO.

Philanthropy Australia believes that having an independent government body, separate from the revenue collection body, which is responsible for determining charitable status, represents an optimal regulatory arrangement and is consistent with international best practice.

Philanthropy Australia respects and values the work of the ATO, and recognises the vital role played by the ATO in administering the taxation system.

Philanthropy Australia notes that in the case of regulating PAFs, the ATO has undertaken this task effectively and worked constructively with stakeholders to implement the regulatory framework.

Although not an optimal arrangement, Philanthropy Australia therefore believes that the ATO could undertake the function of determining eligibility for charitable status satisfactorily.

Having the ATO again determine eligibility for charitable status could provide some benefits, for example through fully integrating the process of obtaining charitable status and the associated tax concessions.

However, for such a framework to work satisfactorily a number of key components would be necessary.

#### A Dedicated Unit within the ATO

One of the benefits of the ACNC is that it has a dedicated focus on charities. It is therefore well equipped to understand their needs and circumstances and support them with guidance and education where necessary.

It also has succeeded in bringing together an impressive staff with a strong understanding of charity law and the regulatory framework for charities.

Having a dedicated unit within the ATO could assist in maintaining some of these benefits of the ACNC. The Options Paper proposes such an approach, which Philanthropy Australia welcomes.

Such a unit would ideally have the following characteristics:

- A dedicated focus on charities (possibly together with not-for-profits), with it being the single interface for organisations seeking to obtain charitable status and the associated tax concessions, and for any ongoing interactions with the ATO
- A distinct corporate identity, such as 'ATO – Charity and NFP Services'
- A strong emphasis on supporting charities and their understanding of relevant legal obligations, particularly through the provision of guidance and education
- A separate public performance reporting framework, within the broader ATO public reporting framework, which is set against specific and tailored performance benchmarks

There would be merit in establishing and specifying the role of this dedicated unit through legislation.

#### **Recommendation 4**

***In the event that responsibility for determining eligibility for charitable status is returned to the ATO, a dedicated unit within the ATO should be established to undertake this function, with the unit having a distinct corporate identity, a strong emphasis on supporting charities and a separate public performance reporting framework.***

***Establishing and specifying the role of this dedicated unit should be done through legislation.***

### A Robust Independent Decision Making Process

The Options Paper recognises the concern held by many stakeholders, including Philanthropy Australia, regarding the potential conflict of interest between the functions of determining eligibility for charitable status and administering the associated tax concessions.

Although this may only be a potential or perceived conflict of interest, it is important that any framework which replaces the ACNC is designed in a manner which recognises the importance of having an independent process for determining eligibility for charitable status and avoids even the perception of such a conflict.

Philanthropy Australia welcomes the recognition of this issue by the Government, and its desire to ensure the independence in the decision making process when determining eligibility for charitable status.

However, neither of the options proposed in the Options Paper would provide the necessary independence which the Government is seeking to ensure.

With certain important modifications, 'Option One' could provide this independence, and therefore the discussion below focuses on this option.

#### *An Independent Panel*

The Options Paper proposes that an independent panel be established, 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.

As this panel would only be able to provide recommendations to the Commissioner of Taxation, it only amounts to a non-binding review mechanism. The decision maker regarding charitable status would still be the Commissioner of Taxation, who could choose to ignore the recommendation of the panel.

In order to provide for a properly independent process for determining eligibility for charitable status, three alternative options are proposed:

- That the independent panel is itself made the statutory decision maker for assessments of charitable status, a power which it can delegate to the relevant ATO officials, particularly for routine decisions which form the vast bulk of determinations of charitable status – this would be Philanthropy Australia's preferred option
- That the independent panel's recommendations are binding on the Commissioner of Taxation – effectively making the independent panel a binding review mechanism, but one which is likely to be easier and more affordable to access compared with lodging a formal appeal to the Administrative Appeals Tribunal
- That there is full public transparency of the independent panel's recommendations to the Commissioner of Taxation, and the Commissioner's responses to the recommendations – this would



enable there to be a better understanding of the reasoning behind particular decisions, particularly where there is a disagreement between the independent panel and the Commissioner of Taxation.

Again, there would be merit in setting out any decision making process in legislation. This could include specifying matters to be considered as part of the process, such as the decision makers having regard for:

- The distinction between charitable status and access to tax concessions
- The independence, diversity and sustainability of charities
- The principles of proportionate and risk-based regulation

#### ***Recommendation 5***

***In the event that responsibility for determining eligibility for charitable status is returned to the ATO, an independent panel should be made the statutory decision maker for assessments of charitable status, with the power to delegate decision making to relevant ATO officials.***

***This decision making process should be set out in legislation, with the legislation specifying matters to be considered as part of the decision making process.***

#### **5. Proportionate Compliance Framework**

Philanthropy Australia supports the Government's objective to ensure compliance arrangements are simple, efficient, and ensure appropriate accountability for activities which benefit from tax concessions.

In the discussion in section 3 of this submission regarding the proposed self-reporting arrangements, Philanthropy Australia has already pointed out the challenges associated with enforcing such arrangements.

Philanthropy Australia believes these challenges require further consideration of the proposed self-reporting arrangements and alternative reporting models which could be implemented and managed more effectively.

A 'regulatory approach' document has been developed by the ACNC in consultation with stakeholders, and provides a useful statement of how the ACNC approaches its current responsibilities.<sup>2</sup>

There would be merit in the dedicated unit within the ATO which is made responsible for determining eligibility for charitable status developing a similar 'regulatory approach' document, which is charity-specific and sufficiently detailed.

This would assist charities to understand how the ATO proposes to approach its role and responsibilities when it comes to determining eligibility for

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<sup>2</sup> See:

[http://www.acnc.gov.au/ACNC/About\\_ACNC/Regulatory\\_app/ACNC/Regulatory/Reg\\_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09](http://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx?hkey=8251156f-f3c9-41bb-800a-304c2485be09)

charitable status, and in particular the manner in which the proposed proportional compliance framework will be administered.

As with the development of the ACNC regulatory approach document, a process of stakeholder consultation would facilitate the development of such a document.

#### ***Recommendation 6***

***In the event that responsibility for determining eligibility for charitable status is returned to the ATO, the dedicated unit within the ATO which is made responsible for determining eligibility for charitable status should develop a 'regulatory approach' document in consultation with stakeholders.***

#### **6. Transitional Arrangements**

Given the considerable policy and regulatory change that charities, including Philanthropy Australia's Members, have experienced in recent years, we would ask that transitional arrangements focus on effective communication of changes to charities well in advance of these changes taking effect.

In addition, long lead times would assist in enabling charities to alter existing arrangements to comply with new arrangements.

In particular, the Options Paper proposes that self-reporting arrangements would commence on 1 July 2015. Given that it is now August 2014, Philanthropy Australia believes that the proposed transitional timeframe is too short and that this timeframe should be considerably extended beyond 1 July 2015.

#### ***Recommendation 7***

***That the transitional timeframe for charities to comply with any self-reporting requirements be extended beyond 1 July 2015.***