



AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

***ACFID Submission to the Review of the Australian Charities
and Not-for-profits Commission Legislation***

February 2018

Introduction

1. ACFID welcomes the opportunity to contribute to the review of the key pieces of legislation that enable the regulation of the charities sector by the Australian Charities and Not-for-profits Commission (ACNC).
2. As this legislation sets out the fundamental objectives, powers and functions of the ACNC Commissioner and the Commission and its terms of operation, it is important that this five-year review gives due and timely consideration to both the needs and purpose of the charity sector, and the wider regulatory environment in which our sector operates.
3. ACFID's members work delivering critical international development and humanitarian programs around the world, and are thus regulated through a number of mechanisms, including the requirements set out by the Department of Foreign Affairs and Trade (DFAT), the requirements of tax deductibility under the Overseas Aid Gift Deduction Scheme (OAGDS), and the sector's own regulatory standard, the ACFID Code of Conduct.
4. Consistent with the ACNC's own approach to regulation, and as set out in the *ACNC Act (2012)*, we believe that regulation should be undertaken commensurate to the risks it seeks to address, and in a manner fit-for-purpose for the charitable sector. Further, the introduction of any new regulation on a resource constrained charity sector should only be considered where there is a clearly evidenced and compelling case to do so. Regulation to serve any other objective undermines the important work of the charity sector and is out of step with the expectations of the Australian donor community.
5. We further believe that regulation should be done in line with a principled approach and should start from a clear position that aligns to the values and objectives of the ACNC. In order to reflect the intentions, spirit and purpose for which the ACNC was created and legislated, this review should also seek to address inefficiencies in the operationalisation of the ACNC Act, and the removal of unnecessary regulatory burden wherever possible.
6. We wish to note through this process that the ACNC has been an effective regulator in its first 5 years of operation. The Commission has worked effectively to build trust with the charities sector and the broader public, and has enhanced the accountability of the charity sector. We have welcomed a positive and productive relationship with the Commission during this time, ensuring that the regulatory aspects of the ACNC and the ACFID Code are mutually reinforcing and building capacity within the sector. The Commission's commitment to capacity building within the sector through tools, guidance and learning opportunities aligns with the commitment of ACFID and its members to ongoing learning and good practice.
7. Further to the recommendations put forward in this submission, we would also request that the review takes into consideration the many pieces of proposed legislation currently being considered across Government. Matters currently being considered, such as reforms to the Electoral Act and the measures outlined in the Foreign Influence Transparency Scheme Bill, may have significant material impact on the charity sector's reporting and compliance burden. Whilst these matters are clearly outside the scope of this review, it would be remiss of the review to not take this into account prior to making any final recommendations.

8. We would be happy to provide additional clarity on any of the recommendations contained within this submission. Follow up requests should be directed to Marc Purcell, CEO, ACFID: (02) 6285 1816.

About ACFID

9. The Australian Council for International Development (ACFID) is the peak body for Australia's overseas development and humanitarian not-for-profit organisations. ACFID unites Australia's non-government organisations involved in international development and humanitarian action to strengthen their collective impact against poverty.
10. Our vision is of a world where all people are free from extreme poverty, injustice and inequality; where the earth's finite resources are managed sustainably; and Australia is compassionate and acting for a just and sustainable world. We believe that this vision can only be realised through the collective efforts of civil society, governments, business and individuals concerned for our common humanity.
11. Founded in 1965, ACFID currently has 125 Members and 21 Affiliates operating in more than 90 developing countries. The total revenue raised by ACFID's membership from all sources amounts to \$1.64 billion (2015–16), \$930 million of which is raised from 1.55 million Australians (2015–16). 80 per cent of funding for ACFID Members is from non-government sources. ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community-based groups, with a mix of secular and faith-based organisations. A list of ACFID Member Organisations is at **Annex A**.
12. ACFID's members adhere to a Code of Conduct which is a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations.
13. The Code sets standards for practice rather than standards for results. It goes beyond the minimum standards required by government regulation and focuses on good practice. The Code is underpinned by a set of values and quality principles and speaks to the results we seek to achieve, the processes that support organisations to achieve those results, and the organisational systems that enable our members' work.
14. The Code addresses areas such as fundraising, governance and financial reporting. Compliance includes triennial self-assessment, annual reporting and spot checks. All members are subject to the independent complaints handling process governed by the Code of Conduct Committee (CCC) which is independent from the Governing Board of ACFID.

Summary of recommendations

ACFID's recommendations to this review are detailed in the following submission. In summary, the key recommendations that we make to this review are:

1. That the existing Objects set out in *Division 15* of the *Australian Charities and Not-for-profits Commission Act (2012)* be retained. No new objects should be added.
2. That the Australian Government work with the ACNC to assess the adequacy of resourcing to fulfil the second and third objects of the *Australian Charities and Not-for-profits Commission Act (2012)*.
3. That the following additional sub-section be added to Section 15.10 of the Act:
 - a. *The diverse approaches and methods not-for-profit entities use to achieve their purposes, including but not limited to delivering services, undertaking trading activities, making grants, conducting research and undertaking advocacy.*
4. That Section 115-5 of the ACNC Act (2012) be amended to set out that a due process must be undertaken in the appointment of a Commissioner. At a minimum, this process should include:
 - a. appointment through a Joint Parliamentary Committee;
 - b. candidate vetting processes;
 - c. public hearings prior to confirmation of an appointment; and
 - d. merit-based selection decisions.
5. That the powers of the Advisory board at *135-15 (1)* of the ACNC Act are amended in order to allow the Board to convene and review any matters under the Act, including the functions and powers of the Commissioner, as a matter of own motion, and is not contingent upon the request of the Commissioner.
6. That the recommendations of the ACNC's submission to this review that will result in red tape reduction for the sector are taken up by this review. These include recommendations 19, 20, 22 and 25 of the submission.
7. That the review considers methods for enhancing the usability of the ACNC register, such as through its interface with the ASIC register, and the inclusion of information held by the ATO. This could include:
 - a. A historical record of responsible persons;
 - b. Whether a charity has deductible gift recipient (DGR) status; and
 - c. Whether a charity has an income tax exemption
8. That any changes to the ACNC governance standards recommended through this review should consider important implications for impact and alignment with other regulations affecting the sector, such as the ACFID Code of Conduct.
9. That additional research should be undertaken in the development of a standard for financial reporting in the charitable sector. This research should include consideration of existing

financial standards for charity reporting, such as those required under the ACFID Code of Conduct.

The powers and objects of the ACNC and the ACNC Commissioner as currently articulated in the Act should be retained. No new objects should be added.

1. Division 15 of the *Australian Charities and Not-for-Profits Commission Act 2012* (the Act) sets out three objects:
 - a. To maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b. To support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c. To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
2. The current objects were developed through a robust and extensive consultation process with the charity sector and are framed appropriately as to clearly set out the functions and remit of the Commission.
3. ACFID further notes that the ACNC's own submission to the review has suggested two new objects be added to the Act, being:
 - a. To promote the effective use of the resources of not-for-profit entities; and
 - b. To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public

We believe that broadening the current objects would serve no useful purpose, and risks diluting the focus of the ACNC.

4. Regarding the first proposed object, we do not believe that it is the core role of a regulator to promote the effective use of resources – this is something which is the core responsibility of the boards, staff, beneficiaries and donors of charities. We would be concerned that this object could imply a shift in the ACNC regulatory framework to one which is much more interventionist.
5. Regarding the second proposed object, its inclusion would seem superfluous given that the existing first object of the Act, which focuses on 'maintaining, protecting and enhancing public trust and confidence in the Australian not-for-profit sector', by its very nature requires accountability of not-for-profit entities.
6. This review should, however, consider the current resourcing of the ACNC to achieve the objects set out in the Act. As noted in their own submission to this review, the ACNC is not sufficiently resourced to achieve object (b) of the Act, which is to 'support and sustain a vibrant, independent and innovative' sector, or object (c) of the Act, which is focused on red tape reduction. The allocation of additional resources to the ACNC to achieve these objects and legislative powers to assist in achieving the related goals should be considered.

Recommendation 1: *That the existing Objects set out in Division 15 of the Australian Charities and Not-for-profits Commission Act 2012 be retained. No new objects should be added*

Recommendation 2: *That the Australian Government work with the ACNC to assess the adequacy of resourcing to fulfil the second and third objects of the Australian Charities and Not-for-profits Commission Act 2012.*

The ACNC legislation should make clear that there are a variety of approaches and methods that charities use to achieve their purposes

7. Section 15.10 of the Act currently sets out certain matters which the Commissioner of the ACNC is to have regard to in exercising powers and functions. As currently articulated in the Act, this includes maintaining confidence in the sector; principles of regulatory necessity and proportionate regulation; the need for the Commissioner to facilitate cooperation with other Government agencies; and others.
8. Australian charities are established pursuant to a charitable purpose, as set out in the *Charities Act (2013)*. Legitimate, lawful charitable activities are those which are consistent with the charitable purpose for which the charity was established and in the public benefit.¹ Nonetheless, at present there remains a tendency of regulators whose primary regulatory concerns fall outside the charitable sector to conflate the ideas of charitable activities and charitable purposes.
9. The definition of a charitable purpose is clear in the *Charities Act (2013)*. However, we believe it would further strengthen the definition set out in the Charities Act if the ACNC Act emboldened and clarified this further by acknowledging that charities achieve their purposes using many valid approaches and methods.
10. We believe there would be benefit in adding one sub-section to the matters which the Commissioner of the ACNC is to have regard to in exercising their powers and functions. This sub-section would reflect the fact that charities achieve their purposes using a variety of approaches and methods, including but not limited to delivering services, undertaking trading activities, making grants, conducting research and undertaking advocacy.
11. A new sub-section would make clear that provided charities comply with the Act and associated legislation such as the Charities Act (2013), the ACNC considers these activities to be legitimate and lawful. This sub-section of the Act should delineate some of the different approaches and methods which charities use to achieve their purposes.

Recommendation 3: *That the following additional sub-section be added to Section 15.10 of the Act:*

- i. *The diverse approaches and methods not-for-profit entities use to achieve their purposes, including but not limited to delivering services, undertaking trading activities, making grants, conducting research and undertaking advocacy.*
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¹ See *Charities Act (2013)*, Part 3, Division 1 – Definition of charitable purpose

The appointment of a Commissioner to the ACNC should be made on merit following a fair, open and transparent process

12. ACFID believes that the ACNC Commissioner is a highly important position for the charity sector and the maintenance of public trust, and as such that appointment to this position should be made through a commensurate due process.
13. The present process of appointing a Commissioner is set out at Section 115-5 of the Act. It states that the Commissioner is to be appointed by the Governor-General by written instrument, and that the Commissioner is to be appointed on a full-time basis. The current Act does not set out a process under which such an appointment should be made, nor require key considerations or vetting processes to be carried out in the appointment of a Commissioner to the position.
14. The current system thus is inappropriate to meet the expectations of a transparent recruitment process. Given that the tenure of this position is 5 years and has important implications for the sector, a commensurate process should be undertaken to ensure this appointment is appropriate.
15. This could be achieved through the implementation of a process similar to the process set out for equivalent positions in countries such as the United Kingdom², and at a minimum should include:
 - a. Appointment through a Joint Parliamentary Committee
 - b. Vetting of nominated candidates
 - c. Public hearings before an appointment is confirmed
 - d. Merit-based selection decisions

Recommendation 4: Section 115-5 of the ACNC Act (2012) should be amended to set out that a due process must be undertaken in the appointment of a Commissioner. At a minimum, this process should include:

a) appointment through a Joint Parliamentary Committee; b) candidate vetting processes; c) public hearings prior to confirmation of an appointment; and d) merit-based selection decisions.

² Noting the National Council for Voluntary Organisations' 2015 recommendations on changing the appointment process for the chair of the Charity Commission which included:

- Giving formal control of the appointment to the House of Commons, not the government;
- Widening the membership of the Parliamentary committee responsible for the pre-appointment hearing so it includes representatives of both houses;
- Giving Parliament an effective power of veto at the pre-appointment hearing;
- Requiring a unanimous vote for appointment; and
- Making the chair's term of office non-renewable and fixed.

See more at: <https://www.civilsociety.co.uk/voices/andrew-hind-where-now-for-the-political-independence-of-the-charity-commission.html#sthash.7H7nJ616.dpuf>

Powers of the ACNC Advisory Board

16. The ACNC Act establishes the ACNC advisory board as separate from both the Commissioner and the ACNC. The Advisory Board's independence is important to the function and perception of the ACNC. However, currently the ACNC advisory board can only advise the Commissioner at his or her request. ACFID believes that the Board should be able to proactively raise issues and provide advice to the Commissioner rather than waiting for requests.
17. We believe that further public assurance about the effectiveness of ACNC deliberation on matters regarding Charities, could thus be bolstered by ensuring that the ACNC Advisory Board is regularly convened on a quarterly basis and meets with the Commissioner and deputy Commissioners to provide additional independent advice on matters of the functions of the ACNC, including the functions of the Commissioner. This meeting and delivery of advice should not be contingent upon the request of the Commissioner being exercised.
18. The Advisory Board embodies experts and relevant expertise on charities; is appointed by the Government; and has a clear public benefit role in advising not only the Commissioner, but also the public and Parliament, through submissions, minutes of meetings, and statements. The Act should therefore be amended to reflect this importance and ensure the Advisory Board's capacity to operate independently.

Recommendation 5: *That the powers of the Advisory Board at 135-15 (1) of the ACNC Act are amended in order to allow the Board to convene and review any matters under the Act, including the functions and powers of the Commissioner, as a matter of own motion, and is not contingent upon the request of the Commissioner.*

ACFID supports the red tape reduction measures set out in the ACNC's submission to this review

19. ACFID is pleased to note that the ACNC's submission to this review sets out a number of simple measures that would result in red tape reduction for the sector. Revisions to the Act that will be effective in reducing the regulatory burden on the charitable sector should be welcomed through this review.
20. We believe that the uptake of these recommendations would be a positive outcome. The recommendations that suggest genuine red tape reduction in the ACNC's submission include:
- 19. Amend the Corporations Act to turn off the requirement to appoint an auditor in SS 327A and 327B for charitable companies, or at least for charitable companies that are small or medium registered companies.*
 - 20. That the Commonwealth Government promote the use of the ACNC's charity passport by Commonwealth, State and Territory agencies so as to reduce the regulatory burden on charities*
 - 22. Consider whether registered charities should be able to self-assess their size for reporting purposes in a particular reporting period taking into account the immediately previous reporting period, or in the case of newly established charities, the projected revenue for the following reporting period.*
 - 25. Amend the ACNC Act to give the Commissioner the discretion to permit a person who is taken to be a company auditor under the Corporations Act to undertake an audit of a large registered charity if the Commissioner reasonably believes that the requirement to have an audit undertaken by an entity as specified in the Act will impose an unreasonable burden on the charity*
21. Additionally, we believe that further red tape reduction could be achieved by taking steps to ensure the ASIC register points users to the ACNC register where appropriate. To enhance its usability, the ACNC register should also include a historical record of responsible persons and their terms on a charity, and information sourced from the Australian Taxation Office (ATO), such as whether a charity has deductible gift recipient (DGR) status, and whether a charity has an income tax exemption.

Recommendation 6: *That the recommendations of the ACNC's submission to this review that will result in red tape reduction for the charity sector are taken up in by this review. These include recommendations 19, 20, 22 and 25 of the submission.*

Recommendation 7: *That the review considers methods for enhancing the usability of the ACNC register, such as through its interface with the ASIC register, and the inclusion of information held by the ATO. This could include:*

- i. A historical record of responsible persons;*
 - ii. Whether a charity has deductible gift recipient (DGR) status; and*
 - iii. Whether a charity has an income tax exemption*
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ACFID's members report under the standards set out in the ACFID Code of Conduct³, which is aligned to the ACNC Governance Standards.

22. ACFID's members choose to regulate themselves above and beyond the regulatory standards set out for the wider charity sector through their commitment to the ACFID Code of Conduct. The Code governs the work of all full members of ACFID. Compliance with the Code requires members to report periodically to ACFID and be able to provide evidence of compliance with identified areas of the Code as requested. Compliance with the Code and complaints under the Code are governed by an independent Code of Conduct Committee.
23. Following a significant review process, a revised Code took effect for ACFID's members on 1 June 2017. The revised Code of Conduct is deliberately consistent with the terminology and reporting requirements of other regulators including the Department of Foreign Affairs and Trade and the ACNC. ACFID's Code is aligned to the ACNC's governance standards, as shown in the mapping available on the ACNC website⁴. Registration with the ACNC is a requirement of ACFID membership. Recommendations for changes to the ACNC Governance standards made through this review should take into account the impact on alignment with standards such as the ACFID Code.
24. ACFID further understands that the Australian Accounting Standards Board (AASB) is examining possible options to reform the financial reporting framework for charities⁵. This is also referred to in the ACNC's submission. Much of the current commentary on financial statements not meeting the needs of users highlight issues such as these statements being unnecessarily complex, not focused on outcomes, focused on regulators' needs not users and that they should include some non-financial information.
25. The mandatory financial reporting requirements of ACFID's Code seek to address a number of these issues by requiring annual reports to include a plain language financial summary, as well as information on the members main aid and development activities and their impacts.⁶ We are also looking to improve reporting practice through Good Practice Indicators which cover environment reporting, risk reporting and linking activities to outcomes. Given this, we believe the Code goes some way to providing reporting that meets the needs for users.
26. We support the view that further research should be undertaken and information obtained about the needs of users of financial statements to ensure that changes to the financial reporting framework for charities achieve their purpose. This research should consider the requirements of existing standards for financial reporting, such as those set out under the ACFID Code and whether these standards could be adopted more broadly to suit the needs of the charitable sector.

³ The ACFID Code of Conduct is explained and available for download on ACFID's website at <https://acfid.asn.au/content/read-code>

⁴ See http://www.acnc.gov.au/ACNC/Edu/Comply_ACFID.aspx

⁵ See <http://www.aasb.gov.au/News/AASB-past-events/Australian-Reporting-Framework-for-Charities.aspx>

⁶ Read ACFID's mandatory guidance on financial reporting on our Good Practice Toolkit under 'resources' at <https://acfid.asn.au/content/commitment-83-we-report-acquisition-and-use-our-resources>

Recommendation 8: *That any changes to the ACNC governance standards recommended through this review should consider important implications for impact and alignment with other regulations affecting the sector, such as the ACFID Code of Conduct.*

Recommendation 9: *That additional research should be undertaken in the development of a standard for financial reporting in the charitable sector. This research should include consideration of existing financial standards for charity reporting, such as those required under the ACFID Code of Conduct.*

Annex A – List of ACFID Members

CURRENT FULL MEMBERS

- ACC International Relief
- Act for Peace - NCCA
- ActionAid Australia
- Action on Poverty
- Adara Development Australia
- ADRA Australia
- Afghan Australian Development Organisation
- Anglican Aid
- Anglican Board of Mission - Australia Limited
- Anglican Overseas Aid
- Anglican Relief and Development Fund Australia
- Asia Pacific Journalism Centre
- Asian Aid Organisation
- Assisi Aid Projects
- Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
- Australia for UNHCR
- Australia Hope International Inc.
- Australian Business Volunteers
- Australian Doctors for Africa
- Australian Doctors International
- Australian Himalayan Foundation
- Australian Lutheran World Service
- Australian Marist Solidarity Ltd
- Australian Medical Aid Foundation
- Australian Mercy
- Australian Red Cross
- Australian Respiratory Council
- AVI
- Beyond the Orphanage
- Birthing Kit Foundation (Australia)
- Brien Holden Vision Institute Foundation
- Bright Futures Child Aid and Development Fund (Australia)
- Burnet Institute
- Business for Millennium Development
- CARE Australia
- Caritas Australia
- CBM Australia
- ChildFund Australia
- CLAN (Caring and Living as Neighbours)
- Credit Union Foundation Australia
- Daughters of Our Lady of the Sacred Heart Overseas Aid Fund
- Diaspora Action Australia
- Diplomacy Training Program
- Door of Hope Australia Inc.
- Edmund Rice Foundation (Australia)
- EDO NSW
- Engineers without Borders
- Every Home Global Concern
- Family Planning New South Wales
- Fairtrade Australia New Zealand
- Food Water Shelter
- Foresight (Overseas Aid and Prevention of Blindness)
- Fred Hollows Foundation, The
- Global Development Group
- Global Mission Partner
- Good Return

- Good Shepherd Services
- Grameen Foundation Australia
- Habitat for Humanity Australia
- Hagar Australia
- HealthServe Australia
- Heilala
- Hope Global
- Hunger Project Australia, The
- International Children's Care (Australia)
- International Christian Aid and Relief Enterprises
- International Needs Australia
- International Nepal Fellowship (Aust) Ltd
- International RiverFoundation
- International Women's Development Agency
- Interplast Australia & New Zealand
- Islamic Relief Australia
- KTF (Kokoda Track Foundation)
- Kyeema Foundation
- Lasallian Foundation
- Leprosy Mission Australia, The
- Live & Learn Environmental Education
- Love Mercy Foundation
- Mahboba's Promise Australia
- Marie Stopes International Australia
- Marist Mission Centre
- Mary MacKillop International
- Mary Ward International Australia
- Mercy Works Ltd.
- Mission World Aid Inc.
- MIT Group Foundation
- Motivation Australia
- Murdoch Children's Research Institute
- MAA (Muslim Aid Australia)
- Nusa Tenggara Association Inc.
- Oaktree Foundation
- Opportunity International Australia
- Our Rainbow House
- Oxfam Australia
- Palmera Projects
- Partner Housing Australasia
- Partners in Aid
- Partners Relief and Development Australia
- People with Disability Australia
- PLAN International Australia
- Quaker Service Australia
- RedR Australia
- Reledev Australia
- RESULTS International (Australia)
- Royal Australian and New Zealand College of Ophthalmologists
- Royal Australasian College of Surgeons
- Salesian Missions
- Salvation Army (NSW Property Trust)
- Save the Children Australia
- School for Life Foundation
- SeeBeyondBorders
- Sight For All
- So They Can
- Sport Matters
- Surf Aid International
- Tamils Rehabilitation Organisation Australia
- TEAR Australia
- Transform Aid International (incorporating Baptist World Aid)
- UNICEF Australia
- Union Aid Abroad-APHEDA
- UnitingWorld
- WaterAid Australia
- World Vision Australia

- WWF-Australia
- YWAM Medical Ships

- University of Western Australia – School of Social Sciences
- Vision 2020
- Western Sydney University- School of Social Sciences and Psychology

AFFILIATE MEMBERS:

- Australian Federation of AIDS Organizations
- Australian National University – School of Archaeology and Anthropology, College of Arts and Social Sciences
- Charles Darwin University – Menzies School of Health Research
- Deakin University – Alfred Deakin Research Institute
- James Cook University – The Cairns Institute
- La Trobe University – Institute of Human Security and Social Change
- Murdoch University – School of Management and Governance
- Queensland University of Technology – School of Public Health and Social Work
- Refugee Council of Australia
- RMIT – Centre for Global Research
- Swinburne University of Technology Centre for Design Innovation
- Transparency International Australia
- University of Melbourne – School of Social and Political Sciences
- University of New South Wales- International
- University of Queensland – Institute for Social Science Research
- University of Sydney – Office of Global Engagement
- University of the Sunshine Coast – International Projects Group
- University of Technology, Sydney – Institute for Sustainable Futures

* Denotes Interim Full Member

** Denotes Interim Affiliate Member