



Response to the ACNC Exposure Draft

On 9 December 2011, Minister Shorten released exposure draft legislation for the establishment of the Australian Charities and Not-for-Profits Commission (ACNC). The ACNC will be the national regulator and promote a national regulatory framework for the not-for-profit (NFP) sector.

The focus of Volunteering Australia's review and response to the ACNC Exposure Draft is on aspects of the legislation about which we have concerns as the peak representing not-for-profit organisations that engage and involve volunteers. Where it is within the scope of our role and expertise we have presented alternative approaches that could be considered to address specific concerns.

Summary

As the national peak body working to advance volunteering in the Australian community, Volunteering Australia affirms the protection and confidence appropriate regulation provides to the Australian community. Regulation is also critical to providing protection for volunteers. Volunteering Australia continues to support reform to achieve regulation that:

- ensures good governance, transparency and accountability; and
- enables not-for-profit entities to focus effort and resources on fulfilling their mission for and with local communities.

We support legislation that will enable the regulatory body for the not-for-profit (NFP) sector to undertake its role in effectively, with transparency and in a manner that reduces rather than increases the burden on the NFP sector.

Volunteering Australia's response to the ACNC Exposure Draft is consistent with its submissions to the Scoping Study for a National Not-for-profit Regulator and the Definition of Charities.¹

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http://www.volunteeringaustralia.org/files/46VO8MFJCJ/VA_Submission_Treasury_Scoping_Study_NFP_Regulator.pdf
http://www.volunteeringaustralia.org/files/8ZKEIQZDYK/VA_submission_Definition_of_Charity_9_Dec_2011.pdf

Volunteering Australia recommends inclusion in the ACNC Exposure Draft of 'where the promotion of volunteering for the benefit of the community is the principle purpose' as an additional sub-type of registered entity under the 'Charitable purpose'.

We have also identified potential increases in the cost burden for not-for-profit entities resulting from the additional reporting the Commissioner has power to request *without explanation* under the proposed legislation. We do not support this increased resource burden or the absence of reciprocal transparency on the part of the regulator in undertaking his/her role.

Volunteering Australia has also identified risks to the independence of the not-for-profit sector presented by the extent and scope of powers given to the Commissioner in the ACNC Exposure Draft and recommended amendment of these powers.

Volunteering Australia is concerned by the range and scale of offences and penalties that can be incurred by responsible individuals, which by definition may include volunteer officers and people in other significant voluntary roles. The range and scale of offences and penalties outlined in the ACNC Exposure Draft have potential to discourage voluntary participation in not-for-profit entities.

Volunteering Australia recommends amending the ACNC Exposure Draft to ensure that responsible persons who are volunteers, including voluntary members of Boards of Governance and Committees of Management have a duty to exercise due diligence under the legislation and to comply with that duty but have immunity from prosecution for failing to comply with that duty.

We also note the Exposure Draft for the ACNC does not include mechanisms for hearing and resolving grievances or disputes an individual not-for-profit entity or a class of not-for-profit entities may have with the ACNC.

Volunteering Australia recommends the legislation to establish the ACNC makes provision for the development of an ACNC Charter for Not-for-Profit Entities similar to the Australian Taxpayer's Charter and that the legislation includes review and appeals procedures.

Entitlement to registration (Division 5)

1. An entity may be entitled to registration as one or more types of registered entity and one or more subtypes of registered entity listed in page 10.

Response

The types and sub-types of registered entities in the Exposure Draft should reflect those of the definition of charities which is currently under review by the Department of Treasury.

In its response to the Department of Treasury's Consultation Paper on the Definition of Charity, Volunteering Australia identified the unique issues faced by volunteer organisations under the current definition of charitable organisations and proposed alternatives.

http://www.volunteeringaustralia.org/files/8ZKEIQZDYK/VA_submission_Definition_of_Charity_9_Dec_2011.pdf

Proposed alternative/s:

Consistent with its submission to the Consultation Paper on the Definition of Charities, Volunteering Australia recommends inclusion in the Exposure Draft of 'where the promotion of volunteering for the benefit of the community is the principle purpose' as an additional sub-type of registered entity under the 'Charitable purpose' type of registered entity.

Additional reporting requirements - particular registered entity (Sub-division 55-D, section 55-80)

2. The Commissioner may determine that a particular registered entity must prepare a report in addition to any other statement or report the registered entity is required to prepare. The determination must specify the information to be included in the report and other requirements to be met in relation to the way the report is prepared.
3. The Commissioner may also determine that a particular class of registered entity must prepare a report in addition to any other statement or report the registered entity is required to prepare.

Response

The legislation as it stands does not make it clear on what grounds, the Commissioner can and should request an additional report. It is of concern that the same level of transparency is not required of the regulatory body as the entities for which it has responsibility to regulate.

Additional reporting has potential to increase the regulatory reporting burden on not-for-profit entities. Additional reports that require the services of auditors will increase auditing costs paid by

not-for-profit entities. This outcome would be at odds with the Government's commitment to the not-for-profit sector to reduce 'red tape'.²

Proposed alternative/s:

Volunteering Australia recommends inclusion in the legislation that any determination of the Commissioner that a particular registered entity prepares an additional report also include the *reason* for this additional information or report. This additional provision in the legislation would strengthen the transparency of the Commissioner's role and function in implementing his/her responsibilities under the Act and reduce the potential for increasing the reporting burden placed on not-for-profit entities *without defensible cause*.

All costs of additional reports that require payment of services of auditors over and above those required for completion of annual information reports should be incurred by the ACNC.

Commissioner's powers to give directions (Division 140)

4. 140-10 Commissioner may give directions in certain circumstances

- (1) The Commissioner may give a registered entity a direction of a kind specified in subsection 140-15 (1) if the Commissioner has reason to believe that:
 - (a) the registered entity has contravened, or is likely to contravene, a provision of:
 - (i) this Act; or
 - (ii) any other Australian law that relates to the object of this Act; or
 - (b) the direction is necessary to advance the purpose (or a purpose) for which the registered entity is registered; or
 - (c) the registered entity is conducting its affairs in an improper or financially unsound way; or
 - (d) the direction is otherwise necessary to promote the object of this Act.
- (2) The direction must:
 - (a) be given by notice in writing to the registered entity; and
 - (b) specify the ground or grounds referred to in subsection (1) on the basis of which the direction is given.

5. 140-15 Kinds of direction

- (1) The kinds of direction that the registered entity may be given are directions to do any one or more of the following:
 - (a) to comply with the whole or a part of:

² <http://www.notforprofit.gov.au/about-us/not-profit-reform>
<http://www.communitycouncil.com.au/node/51>

- (i) this Act; or
- (ii) any other Australian law that relates to the object of this Act;
- (b) to ensure a responsible individual of the registered entity does not take part in the management or conduct of the activities of the registered entity except as permitted by the Commissioner;
- (c) to order an audit of the affairs of the registered entity, at the expense of the registered entity, by an auditor chosen by the Commissioner;
- (d) to not enter into a specified commercial transaction, financial transaction or other transaction, including the following:
 - (i) borrowing any amount;
 - (ii) repaying any money on deposit or advance;
 - (iii) paying or transferring any amount or asset to any entity, or creating an obligation (contingent or otherwise) to do so;
- (e) to comply with the registered entity's governing rules;
- (f) anything else as to the way in which the affairs of the registered entity are to be conducted or not conducted, that is necessary to advance the object of this Act.

Note: Information relating to directions, variations of directions and revocations of directions may be placed on the Register in accordance with Division 100.

- (2) A direction under paragraph (1) (d) (to not enter into a specified commercial transaction, financial transaction or other transaction) does not apply to the payment or transfer of money pursuant to an order of a court or a process of execution.
- (3) Without limiting the generality of subsection (1), a direction referred to in a paragraph of that subsection may:
 - (a) deal with some only of the matters referred to in that paragraph; or
 - (b) deal with a particular class or particular classes of those matters; or
 - (c) make different provision with respect to different matters or different classes of matters.
- (4) The direction may deal with the time by which, or period during which, it is to be complied with.

Response

Volunteering Australia considers clauses (a) and (c) to be appropriate circumstances under which the Commissioner may give the kinds of direction listed in 140-15.

Clause (b) raises questions about who determines the purpose of an entity, how this purpose is interpreted and different interpretations by government and the NFP sector.

It potentially undermines the roles of the governing body of the entity which has the responsibility of developing the entity's mission and determining key strategic directions for its achievements.

Conferring power to the Commissioner to give any direction/s necessary to advance the purpose (or a purpose) for which the registered entity is registered also has potential to introduce unwarranted influence and intervention in the purpose and mission of a not-for-profit entity. This provision/power goes to the heart of and challenges the independence of the not-for-profit sector.

Clause (d) is too broad to be meaningful or appropriate.

Proposed alternative/s:

Volunteering Australia recommends deletion of clauses (b) and (d) from section 140-10 of the ACNC Exposure Draft.

Annual information statements (Subdivision 55-A)

6. A registered entity must give a statement (an information statement) for a financial year to the Commissioner in the approved form, Note: the commissioner may approve different approved forms for small, medium and large registered entities.

Response

Consistency in information required from specific types of registered entities is important.

Proposed alternative/s:

Standard templates are produced and made available for small, medium and large entities.

7. A registered entity must give the statement to the Commissioner no later than 31 October in the following financial year. Note: Section 196-55 allows the Commission to defer the time for giving an approved form.

Response

Section 55 E that outlines substituted accounting periods is confusing. It could be deleted if the timeframe for all reporting was within 5 months of the end of the financial year.

Proposed alternative/s:

Volunteering Australia recommends a five month reporting period for all information reports and additional reporting requirements of the ACNC.

This approach would be consistent with regulators such as the Office of Regulatory bodies in the ACT and Consumer Affairs Victoria.

The Advisory Board (Part 6-1)

8. The Advisory Board is to consist of members with (a) expertise relating to not-for-profit entities (including charities), (b) experience and appropriate qualifications in relation to either law, taxation or accounting.

Response

There is a potential risk of the Advisory Board membership being over represented with members who have technical expertise relating to regulatory aspects of the operations of not-for-profits i.e. legal, financial and taxation. This could result in potentially myopic advice being provided to the Commissioner and would be a disservice to the Act and the public.

Proposed alternative/s:

Volunteering Australia recommends that point (a) require expertise relating directly to the mission of not-for-profit entities, and exclude law, taxation or accounting which is covered in point (b).

Division 210- Core concepts

9. 210-10 Small, medium and large registered entities

- (1) A registered entity is a **small registered entity** in a particular financial year if:
 - (a) it is not a deductible gift recipient at any time during the financial year; and
 - (b) the revenue of the registered entity for the financial year is less than \$250,000, or any other amount prescribed by the regulations for the purposes of this paragraph.
- (2) A registered entity is a **medium registered entity** in a particular financial year if:
 - (a) it is not a small registered entity in the financial year; and
 - (b) the revenue of the registered entity for the financial year is less than \$1,000,000, or any other amount prescribed by the regulations for the purposes of this paragraph.
- (3) A registered entity is a **large registered entity** in a particular financial year if it is not a small registered entity or a medium registered entity in the financial year.
- (4) Revenue is to be calculated for the purposes of this section in accordance with accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of the registered entity concerned).

Response

The threshold of \$1,000,000 for determining where a small entity ends and a medium entity begins is too low. Other factors need to be taken into account including size of the paid and unpaid workforce and ration of employees/volunteers.

A large registered entity needs to be clearly defined in financial terms rather than by virtue of it not being a small or medium registered entity.

Proposed alternative/s:

Volunteering Australia recommends:

Changing the threshold for a small registered entity to average annual revenue over three years of \$1 million.

Defining a medium registered entity as having revenue in a particular financial year of \$1 million to \$3 million

Defining a large entity as having revenue in a particular financial year above \$3 million.

10. 210-15 Responsible individuals

(1) If an individual is covered under one or more of the following paragraphs, the individual is a **responsible individual** of the registered entity:

- (a) in the case of a registered entity that is a trust—an individual:
 - (i) who is a trustee of the registered entity; or
 - (ii) who is a director or officer of a trustee of a registered entity (if the trustee is not an individual);
- (b) an individual who is a director or officer of the registered entity;
- (c) an individual:
 - (i) who makes, or participates in making, decisions that affect the whole or a substantial part, of the registered entity’s activities; or
 - (ii) who has the capacity to affect significantly the registered entity’s financial standing; or
 - (iii) in accordance with whose instructions or wishes the responsible individuals of the registered entity are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual’s professional capacity or their business relationship with the registered entity);
- (d) an individual who is any of the following:
 - (i) a receiver, or receiver and manager, of the property of the registered entity;
 - (ii) an administrator of the registered entity;
 - (iii) an administrator of a deed of company arrangement executed by the registered entity;
 - (iv) a liquidator of the registered entity;
 - (v) a trustee or other entity administering a compromise or arrangement made between the registered entity and someone else.

Offences and penalties

11. Penalties range from 30 penalty units to 150 and 2 years imprisonment.

Response

Given that responsible individuals (as defined under the ‘Core Concepts’) may include volunteer officers or volunteers in other significant roles, the duties of responsible individuals outlined, and the range and scale of offences and penalties under the provisions of the Exposure Draft, there is significant potential for disincentive to volunteer.

Any increase in the risk of civil or criminal liability and potential personal financial loss is likely to deter some people from volunteering for not-for-profit entities.

The risks to volunteering presented in the current Exposure Draft are similar to those identified by and on behalf of volunteer organisations in relation to the Model Work Health and Safety Act.

Proposed alternative/s:

Volunteer Australia recommends amending the ACNC Exposure Draft legislation to ensure that responsible persons who are volunteers, including voluntary members of Boards of Governance and Committees of Management have a duty to exercise due diligence under the Act and to comply with that duty *but that he/she cannot be personally prosecuted for failing to comply with that duty*. This immunity from prosecution and severe financial penalties are recommended to ensure voluntary participation in not-for-profit entities is not discouraged.

Other comments: Mechanisms for hearing grievances and resolving disputes

There may be times when a not-for-profit entity may disagree with the assessment, ruling or direction of the ACNC about how the law applies to its affairs.

Volunteering Australia notes the Exposure Draft for the ACNC does not include mechanisms for hearing and resolving grievances or disputes an individual not-for-profit entity or a class of not-for-profit entities may have with the ACNC. Volunteering Australia notes the Australian Taxation Office has a Taxpayer's Charter and considers that a similar document which is developed in consultation with the NFP sector would be of assistance.

Proposed alternative/s:

Volunteering Australia recommends the legislation make provision for the development of an ACNC Charter for Not-for-Profit Entities, similar to the Australian Taxpayer's Charter.

Other comments: Review and appeals procedures

Volunteering Australia also notes with concern the omission of the review and appeals process in the ACNC Exposure Draft.

Proposed alternative/s:

Volunteering Australia recommends inclusion of review and appeals procedures in the legislation to establish the ACNC.

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