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Not-for-Profit Sector Development Blueprint Issues Paper  
Blueprint Expert Reference Group

Submitted Online: [Developing a Not-for-Profit Sector Development Blueprint](#)

Our reference: ACNCSUB2024/1

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to comment on the Not-for-profit Sector Blueprint. As Commissioner, I am also a Blueprint Engagement Ally.
2. We have addressed only the questions in the Issues Paper that we consider are relevant to our role as a national charity regulator.

#### About the ACNC and the charity sector

3. We are the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:
  - a. maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector
  - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector, and
  - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
4. Currently, we have oversight of around 60,000 registered charities, but not the wider not-for-profit sector. These charities vary considerably in size, role, and function. Charities are a vital part of our community and economy. Registered charities employed over 1.42 million people<sup>1</sup> and reported revenue of \$190 billion in the 2021 reporting period.<sup>2</sup> While some charities are large and well-known entities, most charities are very small, volunteer-run organisations.<sup>3</sup>

#### 2.1.1 What is your vision or aspiration for the NFP sector over the next 10 years?

5. Our *Corporate Plan 2023-24* sets out our overall vision, which is “Charities that inspire confidence and respect”.<sup>4</sup>

<sup>1</sup> ACNC, *Australian Charities Report – 9th edition* (21 June 2023), 19, <<https://www.acnc.gov.au/tools/reports/australian-charities-report-9th-edition>>.

<sup>2</sup> *Ibid*, 24.

<sup>3</sup> *Ibid*, 12; 19-21.

<sup>4</sup> ACNC, *Corporate Plan 2023-24*, 2, <<https://www.acnc.gov.au/about/corporate-information/our-vision-mission-and-values/our-corporate-plan/corporate-plan-2023-24>>.



6. Our 2024/25 strategic priorities include:
  - a. The Charity Register,
  - b. Supporting charities and building capability, and
  - c. Using our data to maximum effect.<sup>5</sup>
7. In line with our statutory objects and Corporate Plan, our vision is to both support charities and be a source of truth for the community when seeking reliable information about charities.
8. We work to support charities to be well-governed, using their resources for their charitable purposes. By doing this, they will inspire confidence in the public to donate and volunteer. This will, in turn, support their economic and social contribution to Australian communities and those overseas communities where Australian charities work.
9. From our work with charities (via our various consultation forums, our advice services enquiries and sector presentations, for example),<sup>6</sup> we hear the sector is facing a range of challenges that will be important to navigate during the next decade if the sector is to remain strong and vibrant. Some of the challenges are faced by all sectors (such as cyber security or labour force challenges) and others are particular to charities and other not-for-profits (engagement and retention of volunteers, changes to charity tax concessions and fundraising laws, for example).
10. For our role in protecting public trust and confidence in charities, secrecy reforms will be important. In November 2023, we began publishing de-identified reasons for registration decisions.<sup>7</sup> Amendments to the ACNC Act to allow disclosure of new and ongoing investigations are currently before Parliament.<sup>8</sup> We also support consideration of reform to our regulations which would allow us to disclose finalised investigations and resulting compliance action on the Register as it would aid community confidence in charities and in our agency as an effective regulator.<sup>9</sup>

#### **4.1.1. How can the role of advocacy by NFP organisations be better embedded and preserved in policy and legislation?**

11. Charities may find navigating the requirements of charity law complex when considering whether to engage in advocacy. We comment on the following key issues:
  - a. ensuring that the advocacy is in furtherance of a charitable purpose,

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<sup>5</sup> Ibid.

<sup>6</sup> In 2022-23, we answered 22,932 calls and attended 193 meeting or forums that involved charities, sector representatives or peak bodies. See ACNC, *ACNC Annual Report 2022-23* (18 October 2023), pages 17, 26, and 33, <<https://www.acnc.gov.au/tools/reports/acnc-annual-report-2022-23>>.

<sup>7</sup> ACNC, *ACNC Secrecy Reforms Project*, <<https://www.acnc.gov.au/tools/acnc-secrecy-reforms-project>>.

<sup>8</sup> See *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023*, Schedule 6.

<sup>9</sup> *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, Report and Recommendations* report, recommendation 17.



- b. ensuring that the advocacy does not amount to a disqualifying purpose, as defined in the *Charities Act 2013* (Cth), and
- c. potential difficulties in obtaining registration as the public benevolent institution subtype.

*In furtherance of a charitable purpose*

12. The *Charities Act 2013* (Cth) (**Charities Act**) defines “charitable purpose” to include, among other things:<sup>10</sup>

“the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

- (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
- (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.”

13. A charity is not required to be registered with the subtype “Advancing public debate (promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state, territory or another country)” to engage in advocacy, as long as the advocacy activity is in line with its charitable purposes.

*Disqualifying purposes*

14. The Charities Act defines a charity as, among other things, an entity that does not have a disqualifying purpose.<sup>11</sup> Disqualifying purposes include:

- a. the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy, or
- b. the purpose of promoting or opposing a political party or a candidate for political office.<sup>12</sup>

15. As a result, charities can use advocacy as a tool for securing or opposing any change to a law, policy or practice in the Commonwealth, a State or Territory, or another country, where this is in furtherance of their charitable purpose. Charities cannot have a purpose of promoting or opposing a particular political party, or encouraging their members to engage in illegal methods to promote a change to law.<sup>13</sup>

16. To assist charities in navigating the law, we have published guidance on our website regarding how charities may engage in advocacy.<sup>14</sup> This guidance has been viewed

<sup>10</sup> *Charities Act 2013* (Cth), s 12.

<sup>11</sup> *Ibid*, s 5.

<sup>12</sup> *Charities Act*, s 11.

<sup>13</sup> ACNC, *Charities, campaigning and advocacy*, <<https://www.acnc.gov.au/tools/guides/charities-campaigning-and-advocacy>>.

<sup>14</sup> *Ibid*.



1,764 times in 2023. We also provided guidance specifically relating to the referendum about an Indigenous Voice to Parliament, including both a web page<sup>15</sup> and a podcast episode.<sup>16</sup>

### *Public benevolent institutions*

17. Registration as the subtype ‘public benevolent institution’ (**PBI**) is one pathway for certain further tax concessions, for example, endorsement as a deductible gift recipient (meaning donations may be tax deductible for the donor). The meaning of PBI has not been defined by legislation and has instead been developed by decisions of the High Court of Australia and subsequent court decisions.
18. We have issued a Commissioner’s Interpretation Statement explaining the Commissioner’s understanding of the law regarding PBIs (the **PBI CIS**). In the PBI CIS, the Commissioner accepts that a PBI can engage in advocacy in limited circumstances, including when it is ancillary to the delivery of benevolent relief.<sup>17</sup> However, an organisation that is engaged only in advocacy, education and campaigning may not satisfy the definition of PBI.<sup>18</sup> There is an appeal underway in the Full Federal Court of Australia which may shed further light on this issue.

#### **5.1.1. What policy and regulatory reforms would help increase giving to charities?**

19. As we stated in our submission to the Productivity Commission’s 2023 Philanthropy Inquiry (**ACNC Productivity Commission Submission**),<sup>19</sup> we consider our support for public giving to be maintaining the Charity Register, media and education work, and our compliance work.
20. The following issues present obstacles to us when furthering our core work, some of which we have previously discussed in our ACNC Productivity Commission Submission and in other submissions:<sup>20</sup>
  - a. There is no definition of “not-for-profit”
  - b. The ACNC Act does not have whistleblower protections
  - c. There are limitations as to what information can be published on the Charity Register
  - d. ASIC register is not kept up to date
  - e. We do not have a specific power to revoke registered entities that have ceased to operate

<sup>15</sup> ACNC, *Charities, Advocacy and the Referendum on an Indigenous Voice to Parliament*, <<https://www.acnc.gov.au/charities-advocacy-and-referendum-indigenous-voice-parliament>>.

<sup>16</sup> ACNC, *Charities, Advocacy and the Voice Referendum*, <<https://www.acnc.gov.au/tools/podcasts#p53664eed-845a-41e9-8a5b-781d316501da>>.

<sup>17</sup> PBI CIS, [64] – [67].

<sup>18</sup> PBI CIS, [43].

<sup>19</sup> ACNC, *ACNC submission to the Productivity Commission’s Philanthropy Inquiry* (12 May 2023), <<https://www.acnc.gov.au/about/acnc-submissions>>.

<sup>20</sup> Our ACNC Productivity Commission Submission also commented on difficulties in understanding the concept of a government entity. See page 5, *ibid*. As the relevant legislative instrument is under review, we have not repeated those comments here. **See** also ACNC, *Submission to the Review of Australian Charities and Not-for-profits Commission Legislation* (2018) <<https://www.acnc.gov.au/about/acnc-submissions>>.



- f. The criteria to disqualify a person from being a Responsible Person could be widened.

21. We have commented briefly on each of these issues below.

*No definition of “not-for-profit”*

22. One of the conditions for registration as a charity is that the entity must be a not-for-profit entity. There is no definition of not-for-profit in ACNC legislation.
23. On our website, we define not-for-profit as an entity “does not operate for the profit, personal gain or other benefit of particular people (for example, its members, the people who run the organisation, or their friends or relatives)”.<sup>21</sup>
24. The Explanatory Memorandum to the *Charities Bill 2013* (Cth) was prepared on the basis that a definition of ‘not-for-profit’ would be inserted in sub-s 995-1(1) of the *Income Tax Administration Act 1997* (Cth) by the enactment of the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012*. This definition would apply to the enacted *Charities Bill 2013* (Cth). However, the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* did not proceed.
25. In most scenarios, the lack of a statutory definition of ‘not-for-profit’ does not present difficulties. However, in complex scenarios, there can be difficult questions about what requirements must be met to demonstrate that an entity is of a not-for-profit character.

*Whistleblower protections*

26. We are not an eligible recipient within the legislative framework for whistleblower protections. As a result, whistleblowers are likely reluctant to approach us.
27. The *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, Report and Recommendations* report (**ACNC Legislation Review Report**) recommended that the ACNC Act should be amended to include appropriate protections for whistleblowers.<sup>22</sup>
28. Any reforms should include provisions enabling us to share information received from a whistleblower with appropriate third parties that we may work with, such as legal counsel and the ATO.
29. Currently, we may receive whistleblower information from the ATO, as a result of certain exemptions in Pt IVD of the *Taxation Administration Act 1953* (Cth). There are limitations in receiving information in this way.

<sup>21</sup> ACNC, *Not-for-profit*, <<https://www.acnc.gov.au/for-charities/start-charity/not-for-profit>>.

<sup>22</sup> ACNC Legislation Review Report, page 38. See also Appendix B.



### *The Charity Register*

30. The Charity Register is used by philanthropists, donors, and the public for a variety of purposes. A charity's record on the Register provides information about the charity's purposes and the activities it undertakes, whether a charity's reporting is up to date, financial information about the charity, and the names of the people managing a charity's governance and the roles they hold within the charity. This can assist the public in determining whether they want to provide support by way of donations or by volunteering.
31. Including further information on the Charity Register may therefore assist the public and support a culture of giving. However, the ACNC Act and the *Australian Charities and Not-for-profits Regulation 2022* (Cth) (**ACNC Regulations**) limit what can be published on the Charity Register.<sup>23</sup> As a result, we are unable to publish the following items, which are regularly asked for by the public, including researchers, other government agencies and philanthropists:
- Whether a charity has DGR endorsement (allowing donors to search for charities that have DGR endorsement)
  - Legal structure and relevant registration numbers (to understand which other regulators the charity has obligations to)
  - More comprehensive information about formerly registered charities (which increases transparency of the sector)
  - Date of lodgement of the AIS and Annual Financial Report (increases transparency of a charity's compliance).
  - Appointment and cessation dates for Responsible Persons (increases transparency as to who was governing the charity at any particular time)
  - Whether information has been withheld from the Register and an explanation of 'withheld' (which increases transparency)
  - The date of decision to register (which increases transparency).
32. Publication of these items on the Charity Register is likely to be useful for users and promote increased transparency of the sector. However, doing so would require legislative amendments. We note that the Productivity Commission's draft report into philanthropy includes a draft recommendation that the Australian Government "address regulatory impediments to the ACNC presenting more meaningful information on the ACNC charity register, where necessary".<sup>24</sup>
33. Separate challenges are presented by the ACNC Act secrecy provisions. This is also addressed in our Productivity Commission Submission<sup>25</sup> and we note that Treasury has begun work on previous recommendations relating to the Commissioner's discretion to disclose information about regulatory activities.<sup>26</sup>

<sup>23</sup> ACNC Act, Division 40 (maintain the register, information and withholding and removing of information), and ACNC Regulations, Part 2-2, Division 40.

<sup>24</sup> Productivity Commission, *Future foundations for giving – draft report*, draft recommendation 9.1.

<sup>25</sup> Above, n 19, p 15.

<sup>26</sup> Above n 8, Schedule 4.





### ASIC register

34. Some charities are incorporated as companies under the *Corporations Act 2001* (Cth) (**Corporations Act**). Following registration as a charity under the ACNC Act, these charities are not required to report to or update their details with ASIC, due to the operation of s 111L of the Corporations Act.
35. We share information with ASIC for the purpose of updating their records, however, it does not include details of Responsible People.<sup>27</sup> As a result, the ASIC Register does not contain up to date information about them. Although there is a note on the ASIC Register directing users to the Charity Register when people search for companies registered with us, it is often overlooked. Consequently, financial institutions and members of the public searching the ASIC Register may rely on incorrect information. We note that in some situations, some financial institutions may be obliged to obtain data from ASIC.<sup>28</sup>
36. The resulting discrepancies between the ASIC Register and the Charity Register creates significant burdens for charities. As noted in the ACNC Legislation Review Report, even if charities comply with obligations to keep us up to date, important activities such as executing a contract or interacting with banks and financial services providers can be significantly impacted if third parties are relying on ASIC data.<sup>29</sup> We are aware that this burden and confusion has been compounded by the introduction of Director IDs<sup>30</sup> – we note that there is legislation before Parliament to address other unintended burdens for former directors of charitable companies.<sup>31</sup>
37. From a regulatory efficiency and public trust and confidence perspectives, it is preferable for there to be only one source of truth for information regarding registered charities. The Charity Register is freely available online and, as the specialist register, it is arguably the most logical single source of truth for the public, third parties, funders and charities to rely on. Ideally there would be direct linkage from other registers such as the ASIC register, and State and Territory incorporated association registers – effectively ‘no wrong door’ but all pointing to the ACNC register as the single (free) source of truth for registered charities.

### Registered entities that have ceased to operate

38. At present, if a registered charity has ceased to operate, we must rely on a breach of the reporting obligations (our ‘double defaulter’ process<sup>32</sup>) or of Governance Standard 1 to revoke the charity’s registration. This can be time-consuming and resource intensive.

<sup>27</sup> We understand that there are currently barriers to ASIC effectively using our data. In our view, it is preferable that the Charity Register be the one source of truth about charitable companies.

<sup>28</sup> See, by way of example, the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth).

<sup>29</sup> ACNC Legislation Review Report, page 109-110.

<sup>30</sup> See, for example, Institute of Community Directors of Australia, *Regulator accused of harassing former charity board members over director IDs* (23 November 2023) <<https://www.communitydirectors.com.au/articles/regulator-accused-of-harassing-former-charity-board-directors>>.

<sup>31</sup> Above n 8, Schedule 6.

<sup>32</sup> ACNC, *Double defaulters*, <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/double-defaulters>>.



39. The grounds for revocation listed in s 35-10 of the ACNC Act do not include that the registered charity has ceased to operate.
40. This was recommended by the ACNC Legislation Review Report as part of a list of legislative amendments detailed in Appendix B.<sup>33</sup> The then Government's response did not address Appendix B.

#### *Widening criteria to disqualify a person from being a Responsible Person*

41. The ACNC Legislation Review Report recommended that the ACNC Regulations be amended to extend the criteria to disqualify a person from being a Responsible Person to include a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, State or Territory law.
42. This change would also likely require related amendments to expressly authorise us to collect personal details of Responsible Persons at the point of registration and for people who become a Responsible Person after registration (subject to appropriate safeguards).
43. These additions to our regulatory powers may improve public trust and confidence in the charity sector.

#### **6.1.1. What might a regulatory framework for the sector that overcomes the complexity of our federation look like?**

44. There are gaps in our regulatory framework, some of which arise due to the complexity of our federation. We highlight the following issues, which we have previously raised in the ACNC Productivity Commission Submission and in our submission to the Review of the ACNC Legislation (**ACNC Legislation Review Submission**):<sup>34</sup>
  - a. Limitations on enforcement powers
  - b. Difficulties in pursuing charities that have misused their assets
  - c. No common definition of "charity"
  - d. Further work that can be done to reduce unnecessary regulation.

#### *Limitations on enforcement powers*

45. The ACNC Act provides us with a range of enforcement powers, in addition to the power to revoke the registration of a charity. Those enforcement powers range from the ability to issue warnings and directions, enter into enforceable undertakings, apply to the courts for injunctions, suspend or remove a responsible person of the entity, and appoint an acting responsible person.<sup>35</sup> However, these powers can only

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<sup>33</sup> Australian Government the Treasury, 'Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, Report and Recommendations' (2018) Appendix B.

<sup>34</sup> Above n 20.

<sup>35</sup> ACNC Act, Part 4-2.





be exercised in relation to a registered charity that is also a ‘federally regulated entity’ (FRE).<sup>36</sup>

46. Assessing whether an entity is a FRE is a point in time assessment and resource intensive. We must seek legal advice from the Australian Government Solicitor to confirm whether a charity is a FRE. In addition, we do not have an explicit legislative power to require a charity to provide information to make an assessment about whether a charity is an FRE and can only request that charities provide such information voluntarily.<sup>37</sup>
47. In accordance with our Regulatory Approach Statement,<sup>38</sup> we may, in lower-risk situations, provide regulatory advice or enter into voluntary compliance agreements, instead of exercising a formal power or revoking registration.
48. In circumstances where we have determined serious or deliberate non-compliance, we may only have our revocation power available as a regulatory action. To be able to exercise those other powers for non-FREs would most probably require a referral of powers from the States to the Commonwealth. Having the same (full) range of powers for all registered charities would support a more efficacious and consistent regulatory arrangements.

#### *Misuse of charitable assets*

49. At present, where there has been a misuse of charitable assets, we cannot directly recover the funds or other assets that have been misappropriated. Our jurisdiction only extends to registered charities and we do not have standing to commence action against individuals who misuse charitable assets.
50. In particular, we do not have the following powers:
  - a. In relation to entities that are not FREs, we do not have any express powers to protect charitable assets. Generally, such powers remain with State Attorneys-General.
  - b. In relation to FREs, the Commissioner does not have any powers in relation to charities that have been deregistered and has only limited powers to pursue individuals.

51. These gaps may hinder trust and confidence in the sector.

#### *No common definition of “charity”*

52. In 2016, we published a paper exploring the opportunities for a common definition of ‘charity’ in all Australian jurisdictions.<sup>39</sup> As the paper notes, there are more than 40

<sup>36</sup> FRE is defined by s 205-15 of the ACNC Act.

<sup>37</sup> ACNC Act, s 70-5.

<sup>38</sup> ACNC, *Regulatory Approach Statement* (July 2020) <<https://www.acnc.gov.au/raise-concern/regulating-charities/acnc-regulatory-approach-statement>>.

<sup>39</sup> ACNC, *A Common Charity Definition* (11 July 2016) <<https://www.acnc.gov.au/tools/reports/common-charity-definition>>.



separate pieces of legislation that define the term ‘charity’, most State-based revenue legislation.

53. The number of definitions adds to the regulatory and compliance burden for charities and for all regulators, as well as the potential for inconsistent treatment of entities across jurisdictions.
54. The then Government’s response to the ACNC Legislation Review Report stated that “*the Government is consulting with States and Territories on the development of a common statutory definition of charity across jurisdictions to replace 45 existing definitions. This will reduce complexity and regulatory burden for charities when seeking tax concessions.*”
55. We understand this work is not presently being actively pursued. We note that there are forums where Commonwealth-State-Territory co-operation (harmonisation) and regulatory reforms can be considered (potentially for this issue and others such as those mentioned in paragraph 56 below). Such forums include the Council on Federal Financial Relations (led agreement on the national harmonisation of fundraising requirements) and the Regulatory Reform Project (within the Commonwealth Department of Finance).<sup>40</sup>

#### *Further work to reduce red tape*

56. In furtherance of our object to 'promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector', we work with other government agencies to streamline reporting requirements, harmonise requirements, and provide guidance and advice to charities. The status of our work is published on our website.<sup>41</sup>
57. We applaud the work jurisdictions have done in relation to fundraising reform, with agreement on a national set of principles reached in February 2023.<sup>42</sup> Some states have begun work to give effect to these principles: for example, the Tasmanian Parliament is now considering a bill which would introduce the principles as regulations under their legislation,<sup>43</sup> and the Queensland Government has published its implementation plan.<sup>44</sup>
58. We also note the unanimous agreement of participants at the one-off National Ministerial Forum on Child Safety in November 2023 that harmonisation of working

<sup>40</sup> Department of Finance, Regulatory Reform, <<https://www.regulatoryreform.gov.au/>>.

<sup>41</sup> ACNC, *Red Tape Reduction*, <<https://www.acnc.gov.au/about/red-tape-reduction>>.

<sup>42</sup> The Hon Dr Andrew Leigh MP, *Agreement reached on reform of charitable fundraising laws* (16 February 2023) <<https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/agreement-reached-reform-charitable-fundraising-laws>>.

<sup>43</sup> Parliament of Tasmania, *Charities and Associations Law (Miscellaneous) Amendment Bill 2023 (26 of 2023)*, <<https://www.parliament.tas.gov.au/bills/2023/charities-and-associations-law-miscellaneous-amendment-bill-2023-26-of-2023>>.

<sup>44</sup> Queensland Government, *National fundraising principles* (28 November 2023) <<https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/consultation-regulatory-reform/2023-reviews-consultations/national-fundraising-principles>>.



with children (and vulnerable people) checks is a priority area; an issue highlighted to us as a major red tape burden for charities.<sup>45</sup>

59. Some government agencies have used ACNC data to pre-fill grant applications. Further work could identify ways in which grant applications and reporting could be streamlined with pre-filling and initiatives such as the updating of the National Standard Chart of Accounts<sup>46</sup> and embedding it in accounting software platforms.
60. It is also important to ensure governments are considering the impact of how changes to legislation or regulation will impact charities and other not-for-profits as this can be different (and even additional) to impacts for business.

### 6.1.2. Are currently available legal structures, governance standards and tax concessions fit for future purpose? How might these be improved or changed?

61. As stated in the ACNC Productivity Commission Submission, the differences in tax benefits and concessions available to different charity subtypes can drive distortionary behaviour in applicants seeking registration.<sup>47</sup>
62. Unlike other jurisdictions overseas, charity registration does not lead to deductible gift recipient (DGR) endorsement by itself. Approximately 18,900 registered charities (40%) are endorsed as DGRs.<sup>48</sup>
63. Registration as the subtype PBI or as the subtype 'health promotion charity' (HPC) are pathways to DGR endorsement and certain other tax benefits. As a result, some applicants may try to frame their applications for registration as a charity in a way that does not accurately reflect their operations or mission, so they achieve a greater level of tax benefits.

### 6.1.4 How could regulatory data be better used and shared with the NFP sector and wider public to support future practice?

64. Our strategic priorities include "using our data to maximum effect".<sup>49</sup> This includes working across governments to reduce unnecessary regulation and, as noted in the Issues Paper, using the data in a variety of ways. For example, we publish the annual Australian Charities Report (including a data explorer<sup>50</sup>), make data sets available for analysis, and display data through the Charity Register. We also encourage members of the public to use the Charity Register regularly, including through our annual safe giving campaign and the media.<sup>51</sup>

<sup>45</sup> Attorney-General's portfolio, *Outcomes of the Ministerial Forum on Child Safety* (24 November 2023) <<https://ministers.ag.gov.au/media-centre/outcomes-ministerial-forum-child-safety-24-11-2023>>.

<sup>46</sup> Regarding the National Standard Chart of Accounts generally, please see ACNC, *National Standard Chart of Accounts*, <<https://www.acnc.gov.au/for-charities/manage-your-charity/national-standard-chart-accounts>>.

<sup>47</sup> Above, n 19, p 3.

<sup>48</sup> ACNC, *Australian Charities Report - 9th Edition Charity Data Explorer*, <<https://www.acnc.gov.au/australian-charities-report-9th-edition-charity-data-explorer>>.

<sup>49</sup> ACNC, *Corporate Plan 2023-24*, <<https://www.acnc.gov.au/about/corporate-information/our-vision-mission-and-values/our-corporate-plan/corporate-plan-2023-24>>.

<sup>50</sup> See <https://www.acnc.gov.au/australian-charities-report-9th-edition-charity-data-explorer> for the data used in our 9<sup>th</sup> edition of the Australian Charities Report. The explorer allows users to carry out their own fine-grain or custom search on topics or statistics of interest.

<sup>51</sup> During 2022-23, we received 1,818 media mentions and there were more than 8.6 million interactions with the Charity Register (see above n 6, p 25 and 33).



65. However, this data is limited to charities only. Despite Parliament's stated intention at the time the ACNC was established, our remit has not been expanded to include not-for-profit organisations.

### 7.1.2. What can the sector do to change understanding of the role of overheads in the value it creates for people, society and funders?

66. We have developed various resources to explain the role of administrative costs to the public. These include:
- a. a podcast episode<sup>52</sup>
  - b. guidance for the public to understand the role of administration costs.<sup>53</sup> This page has been viewed 5,519 times in 2023
  - c. additional guidance for the public regarding popular myths regarding charity money.<sup>54</sup> This page has been viewed 6,805 times in 2023
  - d. information for journalists and the media regarding administrative costs, among other topics.<sup>55</sup>
67. We also promote these messages through our media and social media work. For example, during Australia's 2019-2020 summer bushfires, media reporting emerged suggesting that charities were not using donations appropriately, including by spending too much on administration. We conducted reviews, made our report public, and engaged with the media.<sup>56</sup>
68. We will continue to update these resources and engage elsewhere where appropriate.

### 7.1.3. How can we make employment opportunities attractive and build career pathways to develop the paid NFP workforce of the future?

69. We address below two key issues we understand are faced by charities when considering whether and how to employ staff: public perception regarding pay, and the potential for differences in tax treatment between different organisations in the same sector.
70. In addition, the new limitations on fixed term contracts that took effect in December 2023 also have implications for charities, including relevant exceptions for governance positions and funded positions.<sup>57</sup>

<sup>52</sup> ACNC, *Charities and administration costs* (16 August 2017) <<https://www.acnc.gov.au/tools/podcasts#pc239406e-0594-427c-ab8d-c26817b71f39>>.

<sup>53</sup> ACNC, *Charities and administration costs*, <<https://www.acnc.gov.au/for-public/understanding-charities/charities-and-administration-costs>>.

<sup>54</sup> ACNC, *Charity money myths: the facts about operating as a not-for-profit*, <<https://www.acnc.gov.au/for-public/understanding-charities/charity-money-myths-facts-about-operating-not-profit>>.

<sup>55</sup> ACNC, *ACNC Media Guide*, <<https://www.acnc.gov.au/acnc-media-guide>>.

<sup>56</sup> ACNC, *Media release: Landmark Regulator Reviews Find Bushfire Charities Managed Funds Responsibly Despite Concerns*, <<https://www.acnc.gov.au/media/news/landmark-regulator-reviews-find-bushfire-charities-managed-funds-responsibly-despite-concerns>>.

<sup>57</sup> ACNC, *New Rules to Limit the Use of Fixed Terms Contracts* (5 December 2023) <<https://www.acnc.gov.au/media/news/new-rules-limit-use-fixed-terms-contracts>><https://www.acnc.gov.au/media/news/new-rules-limit-use-fixed-terms-contracts>>.



### *Paying staff*

71. In addition to our guidance regarding administrative costs, we have also published guidance regarding employment of staff at charities, to assist charities in navigating the requirements and to help the public and donors understand that charities are also competing to recruit and retain staff.<sup>58</sup>
72. From 1 July 2022, reform to our reporting requirements mean that large charities need to report the remuneration that they pay to their key management personnel.<sup>59</sup> This will improve transparency regarding the amounts these charities pay to certain staff.

### *Tax treatment*

73. As noted above at [6363], registration as the subtypes PBI or HPC is a pre-requisite for certain tax benefits, including the fringe benefits tax (**FBT**) exemption. Other charities may be entitled only to the FBT rebate.
74. As a result, charities operating in the same sector may be treated differently for tax purposes. This means that the salary packages that a charity can offer will vary depending on their tax entitlements, leading to anomalous results for employees who may be carrying out similar work but are employed by different organisations.

### **9.1.1. What standards of digital capability should the sector aim for and how might these be achieved?**

75. We address two key aspects below: cybersecurity and artificial intelligence.

### *Cybersecurity*

76. We acknowledge that the public is becoming increasingly concerned about the vulnerability of the large amounts of personal and sensitive information held digitally by government, private sector, and community sector organisations. If the community is confident that charities are handling personal information correctly, it will enhance trust and confidence in the Australian not-for-profit sector.
77. Recent examples of cyberattacks on charities include the 2020 attack on a vendor used by Save the Children,<sup>60</sup> the 2022 attack of The Smith Family,<sup>61</sup> and the recent attack of Pareto Phone.<sup>62</sup> News reporting regarding the hack of Pareto Phone

<sup>58</sup> ACNC, *Employing staff at your charity*, <<https://www.acnc.gov.au/tools/factsheets/employing-staff-your-charity>>.

<sup>59</sup> See further, ACNC, *Key Management Personnel Remuneration*, <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/key-management-personnel-remuneration>>.

<sup>60</sup> Save the Children, *Save the Children Statement on Blackbaud Security Breach* (2020) <<https://www.savethechildren.org/us/about-us/media-and-news/2020-press-releases/save-the-children-statement-on-blackbaud-security-breach>>.

<sup>61</sup> ABC News, *The Smith Family says details of around 80,000 donors may have been exposed in hacking attack* (22 November 2022) <<https://www.abc.net.au/news/2022-11-22/smith-family-charity-cyber-crime-hackers-donor-details/101683860>>.

<sup>62</sup> ABC News, *Thousands of donors to Australian charities, including Cancer Council and Canteen, have data leaked to dark web* (23 August 2023) <<https://www.abc.net.au/news/2023-08-23/qld-charity-donors-dark-web-cyber-criminals-pareto-phone/102757194>>.



indicates that the personal data of tens of thousands of donors to large charities, such as the Fred Hollows Foundation, Cancer Council and Canteen, was published.<sup>63</sup>

78. Internationally, of the charities which responded to the UK 2023 Cyber Security Breaches Survey, 24% had identified a cyber breach or attack in the 12 months leading to the survey. This represents a decrease from the result in 2022, where 30% of charities reported identifying a breach or attack.<sup>64</sup> As the authors of that report note, it is not clear if this reflects a decrease in the number of attacks or if organisations had become less capable of identifying breaches or attacks. This may be related to a decrease in the percentage of charities seeing cybersecurity as a high priority perhaps due to competing priorities.
79. In Australia, 8% of respondents to the 2023 State of the Sector Report for Nonprofits reported a cybersecurity incident in the previous 12 months.<sup>65</sup> As with the UK 2023 Cyber Security Breaches Survey, it is not clear if this low percentage is because attackers are not interested in Australian charities, compared to UK charities, or because Australian charities do not have the capability to identify attacks.

#### *Artificial Intelligence*

80. Some charities are already adopting AI technologies. Infoxchange's 2023 survey into how not-for-profit organisations use digital technology found that 24% of respondents were using AI.<sup>66</sup>
81. From our stakeholder engagement, we know some charities are developing AI technologies to support their service delivery, using AI as part of their service delivery, or are using AI tools to support their fundraising. Charities are often at the cutting edge partly because they have limited financial and human resources. Our ninth Australian Charities Report found that total expenses for charities had increased by \$7.1 billion to \$174.8 billion in the 2021 reporting period.<sup>67</sup> Other expenses, which include operational costs, constitute 37.1% of all expenses for the charities sector.<sup>68</sup>
82. Research by the Centre for Social Impact – the *Paying what it takes: Funding indirect costs to create long-term impact* report – found that Australian businesses spent on average 1.8 to 3.6 times more per employee than the not-for-profits

<sup>63</sup> ABC News (21 October 2023), *Pareto Phone, telemarketer at centre of charity cyber hack which targeted tens of thousands of Australian donors, collapses*, <<https://www.abc.net.au/news/2023-10-21/qld-pareto-phone-charity-hack-cyber-criminal/103002650>>.

<sup>64</sup> Maddy Ell and Emma Johns, Chapter 4: Prevalence and impact of breaches or attacks, *Official Statistics Cyber Security Breaches Survey 2023* (19 April 2023) <<https://www.gov.uk/government/statistics/cyber-security-breaches-survey-2023/cyber-security-breaches-survey-2023#chapter-4-prevalence-and-impact-of-breaches-or-attacks>>.

<sup>65</sup> Charity Research Centre AU, *State of the Sector 2023*, 1, <<https://www.uwa.edu.au/schools/-/media/Centre-for-Public-Value/Resources/230906-State-of-the-Sector-Report.pdf>>.

<sup>66</sup> Infoxchange, *Digital Technology in the Not-for-profit Sector Report 2023*, 14 <<https://www.infoxchange.org/au/digital-technology-not-for-profit-sector>>.

<sup>67</sup> Above n 1, 26.

<sup>68</sup> Ibid, 36.





examined in the report.<sup>69</sup> One reason may be that explicit funding for administrative costs, including cybersecurity, is not commonly provided. However, as our website notes, administration costs are not a useful measure of the effectiveness or impact of charities.<sup>70</sup>

83. In this environment, AI can help charities to reduce costs and maximise the use of the data that charities may hold about their beneficiaries and donors.<sup>71</sup> There are, of course, risks (and ethical considerations) to be considered, especially with generative AI.
84. However, as noted in the Issues Paper, some charities may have lower digital capacities and capabilities compared to for-profit entities.
85. Therefore, there may be a need to build capacity amongst employees and volunteers of charities, to ensure that more charities can engage with AI technologies. Beneficiaries of charities may also need to be upskilled, so that they can engage with the decision-making process that may impact them.

#### **9.1.4. How can governments streamline digital systems requirements and support efficiencies for NFP providers?**

86. We are aware there have been government grants available to support small and medium sized enterprises to invest in their cybersecurity. We suggest similar levels of support be considered for charities to assist them to uplift their cybersecurity practices.
87. Additional charity-focused support may be required from law enforcement and government agencies; tailoring the messages to the sector can be important as many do not see themselves in messages that talk about 'business'.
88. To support charities, we have published a Governance Toolkit covering cybersecurity and associated resources. It includes a self-assessment tool and checklist.<sup>72</sup>

#### **10.1.2. What resourcing and regulatory support could be introduced or better used to allow NFPs make best use of their assets in support of operational sustainability and delivering on societal needs?**

89. We acknowledge that charities may engage in commercial ventures to enhance their viability and promote growth in the sector, including entering into an agreement for financing with a for-profit entity (for example, an institutional investor) to unlock equity in their assets.

<sup>69</sup> Centre for Social Impact, Philanthropy Australia, and Social Ventures Australia (March 2022) *Paying what it takes: Funding indirect costs to create long-term impact*, 21-22, <<https://www.socialventures.com.au/work/paying-what-it-takes-report/>>.

<sup>70</sup> ACNC, *Charities and administration costs*, <<https://www.acnc.gov.au/for-public/understanding-charities/charities-and-administration-costs>>.

<sup>71</sup> See, for example, Dr Lobna Karou, *What nonprofits stand to gain from artificial intelligence*, Forbes, 22 January 2021, <<https://www.forbes.com/sites/forbesnonprofitcouncil/2021/01/22/what-nonprofits-stand-to-gain-from-artificial-intelligence/?sh=73b2e1594834>>.

<sup>72</sup> ACNC, *Governance Toolkit: Cyber Security*, <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-toolkit/governance-toolkit-cyber-security>>.



90. In considering whether to embark upon such a venture, charities need to consider the following factors:
- a. **Purpose:** a charity can engage in commercial activities to raise funds for a charitable purpose. It may only engage in commercial activities for a non-charitable purpose if that purpose is incidental or ancillary to, and furthers, its charitable purposes.
  - b. **Private benefit:** a registered charity must consider how the proceeds of any commercial activity will be used. A charity's employees and contractors should be fairly remunerated, but a charity must not set out to generate private wealth for individuals through its activities.  
  
Any returns on investment that a charity partner receives must be applied (or held to be applied later) to its charitable purposes. While a commercial partner may be motivated by profit, its profits must be proportionate to its investment – in other words, it should not profit at the expense of a charity partner.
  - c. **Governance Standards:** registered charities must take reasonable steps to ensure, among other things, that those on their governing bodies (their Responsible Persons) act in good faith in the charity's best interests, ensure that the charity's finances are managed responsibly, and disclose material conflicts of interests.
91. In deciding whether to pursue a particular commercial opportunity, a charity's Responsible Persons may find it difficult to determine whether the opportunity would impact the charity registration, because the outcome turns on the facts of each situation and the law is complex. Charities are likely to need to obtain professional advice in each scenario. This may be costly and could serve as an obstacle to charities wishing to improve their financial position.

### Next steps

92. If you have queries about this submission please contact Dipika Pal, Director, Legal and Policy, [dipika.pal@acnc.gov.au](mailto:dipika.pal@acnc.gov.au), or Ruby Ramachandran, Acting Policy Manager, Legal and Policy, [ruby.ramachandran@acnc.gov.au](mailto:ruby.ramachandran@acnc.gov.au).

A handwritten signature in blue ink, appearing to read 'Sue Woodward'. The signature is fluid and cursive, with a long horizontal flourish at the end.

**Sue Woodward AM**  
Commissioner  
Australian Charities and Not-for-profits Commission