



Australian Government



Australian
Charities and
Not-for-profits
Commission

7 February 2020

Secretariat
Corporate Criminal Responsibility Review
Australian Law Reform Commission
PO Box 12953
George Street
QLD 4003

Email: corporatecrime@alrc.gov.au
Via website upload

Our reference: EXT2020/88

Dear Secretariat,

ACNC Submission – ALRC Corporate Criminal Responsibility Discussion Paper

1. On behalf of the Australian Charities and Not-for-profits Commission (ACNC), I welcome the opportunity to provide a submission to the ALRC in response to Discussion Paper 87 on Corporate Criminal Responsibility and thank you for the additional time within which to do so.
2. I have limited the ACNC submission to consideration of the potential effect of the proposals and questions on registered charities in Australia. I provide this information to assist the Commission in considering final recommendations to be included in the report to the Attorney-General.

About the ACNC and the charity sector

3. The ACNC was established on 3 December 2012 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; and
 - 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 the ACNC's regulatory responsibility extends only to registered charities, as distinct from the wider NFP sector.
5. There are over 57,600 charities on the charity register.¹ Australia's registered charities deliver services, make grants and perform a wide range of other activities to advance health, education, welfare, religious and other charitable causes. Whilst charities employ a

¹As at 7 February 2020. See acnc.gov.au for the most current figure for registered charities.



significant number of people, they also rely heavily on the contributions of volunteers, particularly small charities.²

6. Charities are formed through various legal structures, in particular, incorporated associations, companies limited by guarantee, non-trading cooperatives, indigenous corporations, trusts and unincorporated associations. ACNC records indicate that in excess of 9,700 charities operate through a private or public company structure.³ Charities operating through a trust structure may also use a corporate trustee, however I am unable to provide accurate figures.
7. Accordingly, the corporate criminal responsibility regime, and any amendments to it, impacts a significant proportion of Australian registered charities.

Governance standards and external conduct standards

8. Charities are required to meet certain criteria to be entitled to registration and to remain registered. This includes compliance with governance standards and external conduct standards as set out in the *Australian Charities and not-for-profits Commission Act 2012* (Cth) (ACNC Act). The governance standards apply to all charities and the external conduct standards apply to those charities that operate outside Australia. If a registered charity is found to be in breach of the standards, the ACNC will undertake enforcement actions against a charity, up to and including revocation of registration as a charity. This may impact availability of federal tax concessions and certain state concessions.
9. The governance standards and external conduct standards explicitly require charities to comply with Australian legislation, including criminal and civil law.
10. In particular:
 - a. Governance Standard 3 requires compliance with Australian laws that are indictable offences or civil offences carrying in excess of 60 penalty units;
 - b. Governance Standard 5 requires responsible persons to act with integrity;
 - c. External Conduct Standard 1 requires a charity to comply with certain Australian laws.

Impact of amendments to the corporate criminal responsibility regime

11. There are several themes arising out of the discussion paper that I consider could particularly impact charities, which I seek to bring to the ALRC's attention.
12. Due diligence defence: There may be a relatively higher impost on charities of the legal burden of proving a due diligence defence were the strength of that defence to be measured against corporations with greater resources both in financial terms and employment of paid staff. As above, a number of charities rely on volunteer efforts. Expectations as to what constitutes having exercised due diligence could be clarified by a legislated reasonableness test.

² Refer to Australian Charities Report 2017 for relevant information: acnc.gov.au. This is the latest publicly available information.

³ As at 7 February 2020.

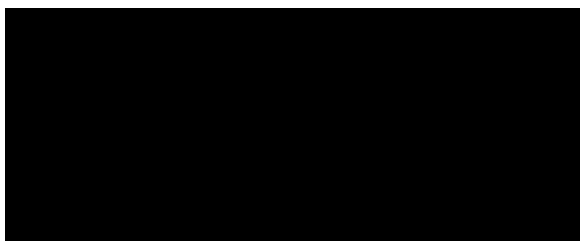


13. Where a corporation is found guilty of a criminal offence: As charities and their responsible persons are required to meet particular standards, it may be of benefit to require notification to the ACNC when corporate charities and their directors and/or responsible persons are found to have committed a criminal offence. This would allow the Commissioner to assess the risk of the charity contravening the governance standards and/or external conduct standards.
14. Extraterritorial obligations: For similar reasons as outlined in respect of due diligence obligations, there may be a relatively higher impost on charities of increased obligations, especially extraterritorially, when many of the directors and/or responsible persons are operating in a volunteer capacity or have limited financial resources. Consideration could be given to extraterritorial obligations being subject to a reasonableness test.

Further information

15. I can provide further information should this be useful to the Commission. Should you have any further queries, please contact me on [REDACTED]

Sincerely,



Anna Longley
Assistant Commissioner General Counsel
Australian Charities and Not-for-profits Commission