



AUSTRALIAN
**CRIMINAL
INTELLIGENCE
COMMISSION**

Review of the Australian Charities and Not-for- Profits Commission (ACNC) Legislation

Australian Criminal Intelligence
Commission Submission

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INTRODUCTION

1. The Australian Criminal Intelligence Commission (ACIC) welcomes the opportunity to make a public submission to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation. The contents of this submission are unclassified and suitable for public release.
2. The ACIC's work collecting and analysing intelligence on the national security impacts of serious and organised crime is directly relevant to the Terms of Reference of the review, in particular, that the ACNC Acts do not impair the work of the ACNC Commissioner to deliver against the objects of the principal Act; being:
 - 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.
3. This submission builds on an in-person briefing provided to the review panel in Melbourne on 16 February 2018. It focuses on the vulnerabilities and risks in the charities and not-for-profits sector (NFP) as they relate to terrorism financing and are directly relevant to points (a) and (c) above.

BACKGROUND

4. The ACIC was formed on 1 July 2016 as a result of the merger of the Australian Crime Commission and CrimTrac. The ACIC is Australia's national criminal intelligence agency, uniquely equipped with intelligence, investigative and information delivery functions. The agency works with partners on the serious and organised crime threats of most harm to Australians and the national interest, and provides national policing information systems and services.
5. The mission of the ACIC is to make Australia safer through an improved national ability to discover, understand and respond to current and emerging crime threats and criminal justice issues, including the ability to connect police and law enforcement to essential policing knowledge and information.
6. The ACIC produces strategic intelligence that builds the national picture of serious and organised crime. In addition, the Commission works on specific ACIC Board-approved special investigations, special intelligence operations and associated task forces. One of the Board-approved priorities is the whole-of-government response to national security threats through intelligence developed under our National Security Impacts from Serious and Organised Crime (NSISOC) Determination. This area of work is focused on the convergences between serious and organised crime and national security. Under NSISOC, the ACIC has also focused on methodologies used to financially support terrorist activities under an associated Project.
7. This project was established to focus on the disruption of high-risk terrorism financing methodologies, including the international transfer of at-risk funds through high risk methodologies, sectors and financial products. Under this project, the ACIC has conducted focused intelligence collection and analysis on the vulnerabilities to terrorism financing in the charities and NFPs sector. To date, this has included:

- The use of advanced analytics to identify high risk charities recorded in national criminal intelligence holdings;
 - Detailed and wide-ranging intelligence collection on three 'at risk' Australian-based charities, including the use of the ACIC's coercive powers, principally hearings and the collection and analysis of internal documents relating to governance and risk;
 - An assessment of specific vulnerabilities to terrorism financing in the charities and NFPs sector including potential legislative and regulatory reform that might reduce the risks associated with these vulnerabilities.
8. A significant body of work under this project was conducted in collaboration with the ACNC and the Australian Transaction Reports and Analysis Centre (AUSTRAC), including in support of the 2017 National Risk Assessment on Money Laundering and Terrorism Financing in Australia's Non-Profit Organisation Sector.
9. The ACIC's focus for its detailed intelligence collection was 'at risk' charities; that is, where intelligence indicated there may be terrorism financing risks present within the charity's operations. These risks were identified primarily using existing criminal intelligence holdings and financial intelligence.

CONTEXT

10. The AUSTRAC and ACNC-led 2017 National Risk Assessment on money laundering and terrorism financing in Australia's non-profit organisation sector has noted that Australian charities have a long history helping the most vulnerable and disadvantaged, both in Australia and abroad. Many of these charities operate in, or send funds to, conflict zones and other unstable regions. It also notes that these are necessarily challenging environments to operate in, not only for service delivery but also for establishing and implementing governance structures and financial controls. The risk assessment identified that Australian not-for-profit organisations remain vulnerable to the risk of money laundering and terrorism financing. While proven instances of money laundering and terrorism financing in this sector remain low, this illicit activity could severely damage public trust and confidence in the sector and harm the communities they are working to assist.
11. The ACIC acknowledges that the charities and NFP sector in Australia is large and diverse and makes a significant contribution to the Australian community. Although the ACIC's focus to date has been on a relatively small number of 'at risk' charities, the vulnerabilities to terrorism financing that have been identified have broad applicability across the sector.

VULNERABILITIES TO TERRORISM FINANCING

12. The ACIC has identified the following broad vulnerabilities and risks to terrorism financing in the charity and NFPs sector:

- Staff;
- Governance;
- Regulation; and
- High risk operating environments.

Staff – background checking and training

13. The ACIC has identified a relatively small number of people involved in the charities and NFPs sector who are members of a nationally significant organised crime group or outlaw motorcycle gang. The ACIC has also identified registered charities that are recorded in law enforcement intelligence holdings for their suspected role in a range of criminal offending. These results indicate that there are potentially integrity issues associated with a number of charities and charity personnel in Australia. Despite these findings, the ACIC has found that the current disqualifying criteria for responsible people articulated in ACNC Governance Standard 4 is narrow and excludes some serious offences and criminal behaviour that would be relevant to question that person's suitability to be a responsible person of a charity in Australia.

14. The ACIC has also identified the absence of minimum standards relating to staff training and development as a vulnerability for some charities. In some cases, people with limited to no experience in the sector, or the operation of a corporate entity, were involved in operating charities in high risk offshore locations with access to substantial sums of money. Some sectors of the Australian economy have introduced comprehensive licensing regimes which mandate that licence holders must meet minimum standards of training and competence, including ongoing professional development. These licensing regimes serve to ensure that people in positions of responsibility have the requisite skills to effectively perform their roles prior to entering the sector and then throughout their careers in that same sector.

Governance – policies and procedures

15. The ACIC has found that some charities at greater risk of being exploited for terrorism financing are less likely to have robust or best practice corporate governance measures in place. For instance, the ACIC has found that:

- formalised and documented policies and procedures may not exist or may not be adhered to, despite the charity operating in high risk offshore locations;
- a lack of transparency may exist in corporate reporting and decision making. For example, decisions made by the Board of Directors may not be documented or Annual Reports may either not be produced or not provided to the public;
- decision making may be concentrated among a small number of senior staff. Higher risk cases have included instances where those senior staff are close friends or relatives; and

- offshore procurement processes are often open to exploitation due to a failure to adhere to best practice.
16. In some cases, these issues may be due to poor awareness among some charities, particularly unregistered charities, of what constitutes good governance and how failure to adhere to these principles and practices may increase the risk of being exploited for terrorism financing purposes.

Regulation

17. Currently, some regulatory obligations, such as the requirement to report annually to the ACNC, are imposed on registered charities based on charity size ('small', 'medium' or 'large') which is determined by revenue. This regulatory model may not adequately consider the risk posed by each charity, as the terrorism financing risks are unlikely to be related to the size of the charity. The ACIC has assessed that, smaller charities are more likely to be at risk for exploitation for terrorism financing purposes because they are less likely to have the resources to ensure robust governance and risk assessment frameworks. Therefore, the application of enhanced regulatory obligations might best be decided based on risk, rather than charity size. This would serve to place the highest regulatory burden on those charities that are at greatest risk of exploitation and reduce the burden on those that are at the least risk of exploitation.
18. While the current regulatory system is effective in promoting enhanced governance standards, transparency and record keeping, the ACIC has identified that the ability for charities to operate outside of the ACNC-led national regulatory system may create a two tier sector with potentially significant discrepancies between the two. A charity that is not registered with ACNC may be more likely to have less developed governance standards, transparency, record keeping and a reduced awareness of the risks associated with their operations, particularly offshore. In addition, unregistered charities are not required to submit information on their responsible persons to the ACNC, which may result in unsuitable persons controlling these charities.
19. In one case, the ACIC found that an Australian-based charity that was registered with the ACNC, and considered by the ACIC to be at a high risk of being exploited for terrorism financing purposes, had their registration revoked. Despite the charity being at risk of being exploited for terrorism financing, it was able to continue to operate outside of the ACNC regulatory regime. In another case, an Australian-based charity also considered to be at a high risk of exploitation had applied for registration with ACNC. This charity decided against proceeding with its registration application because the registration requirements were deemed too onerous. In both cases, high risk charities were able to operate outside of the current national regulatory framework. The net result was that these charities continued to function with limited oversight and even greater risk of exploitation for terrorism financing.
20. In addition to its primary role in regulating the charity sector, the ACNC has a role to play in contributing to Australia's national security given its role in engaging with and regulating a sector that is known to be at risk of terrorism financing. The ACNC does not presently have access to criminal information and intelligence which is vital to identifying high risk entities and ensuring that these entities are the subject of enhanced compliance checks.
21. The ACIC has also found that charities known to be at risk of exploitation for terrorism financing have shown a lack of awareness of the ACNC, its role and functions and the resources available to assist charities to meet their reporting and governance obligations.

High risk operating environments

22. There is no formally recognised definition of a ‘high risk operating location’ for a charity, however it is almost certain that charities with operations in locations with certain risk characteristics represent a greater risk of exploitation for terrorism financing. Risk characteristics might include the presence of proscribed terrorist organisations in the country of operation, recent terrorist attacks, close proximity to conflict zones or political and economic instability. There are a range of additional characteristics that could also be considered.
23. The ACIC found that charities operating in high risk locations were not necessarily aware of the inherent risks and had not implemented additional controls to reduce the likelihood of exploitation. In addition, these charities did not appear to seek access to reliable additional information to inform themselves of the current risk environment.

OPPORTUNITIES TO REDUCE THE RISKS OF TERRORISM FINANCING

An enhanced risk-based regulatory model

24. A regulatory framework that is based on a charity’s risk profile would offer policy responses with greater flexibility in application and reduce the impact on the areas of the sector with lower risks. A sector specific risk-based regulatory model would identify high risk charities based on specific risk indicators such as the high risk financial transactions, operating in locations with proscribed terrorist organisations, and other criminal-related risks such as fraud and money laundering. These risk indicators would inform the charity’s risk rating and determine the regulatory and compliance regime for the charity and its activities. It is important to note that if a charity’s activities change, the risk profile would likely alter (a flexible response) which would necessitate varying the regulatory and compliance regime. Such a model could be used to better direct regulatory obligations onto those charities that represent the greatest risk of being exploited while removing unnecessary obligations on lower risk charities.
25. The following enhanced regulatory obligations could be considered for higher risk charities:
- the introduction of a ‘fit and proper person’ test in order to strengthen the responsible person regime;
 - the development of training and development standards;
 - enhanced governance requirements, including reporting;
 - mandatory registration; and
 - the provision of additional knowledge resources to charities operating in higher-risk locations

Enhanced ACNC access to information and intelligence

26. A wide range of government agencies could contribute information and intelligence to inform a charity’s risk profile, including law enforcement, national security, financial intelligence agencies,

regulatory agencies and the private sector. Forming partnerships with these agencies, be they informal or formal, would permit a richer risk picture to inform a charity's risk profile and direct ACNC's regulatory and compliance activity. To enhance ACNC's access to criminal information and intelligence the following could be considered:

- obtaining access to selected criminal intelligence databases, where permitted by legislation;
- the use of secondments;
- establishing information sharing schemes with partner agencies; and
- closer integration with Australian law enforcement agencies to better target compliance activities.