



Australian Government

Department of Education and Training

Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

Submission from the Department of Education and Training
to the ACNC Review Panel

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Introduction

The Australian Government Department of Education and Training (the department) welcomes the opportunity to make a submission to the Australian Charities and Not-for-profit Commission (ACNC) Review Panel and to assist with identifying opportunities for improvement in the ACNC’s regulatory environment.

In preparing this submission, the department has specifically considered arrangements relating to Australia’s schooling sector and its intersection with the department’s and ACNC’s legislative requirements.

The department supports appropriate transparency and accountability for the record and growing levels of Australian Government funding in schools, while minimising administrative burden on the schooling sector where possible.

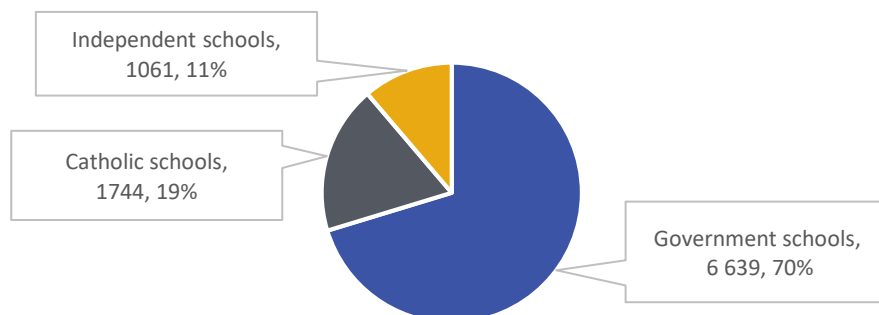
Overview of Schooling in Australia

In 2017 there were 3,849,225 students in 9,444 schools in Australia (*Australian Bureau of Statistics, Schools, Australia 2017*). To be eligible to receive funding under the *Australian Education Act 2013* (Education Act), schools must meet a number of eligibility requirements – one of which is that the school operates on a not-for-profit basis (Section 75).

Under the Constitution of Australia, state and territory governments have primary responsibility for the provision of schooling to all school-aged children within their jurisdiction. This responsibility includes registration of government and non-government schools, and teachers. State and territory governments are the majority public funder for government schools, and contribute supplementary funds to non-government schools. Conversely, the Australian Government is the majority public funder of non-government schools and provides supplementary funding to government schools.

The schooling sector in Australia is diverse. Non-government schools include religious schools that are associated with religious authorities, and secular schools, which are not associated with religious authorities. In the non-government sector, there are single school entities as well as entities responsible for a group of schools.

Figure 1. Total number of schools in Australia by sector (2017)



Source: Australian Bureau of Statistics, *Schools, Australia 2017*.

The total combined recurrent education expenditure in 2015-16 from the Australian Government and state and territory governments was \$55.7 billion, of which \$42.4 billion was spent on government schools and \$13.3 billion spent on non-government schools (*Report on Government Services, 2018*). In addition to public monies, non-government schools in 2016 also received \$10.7 billion through student fees and other income (Department of Education and Training's *Financial Questionnaire, 2017*).

With constitutional responsibility for schooling sitting with state and territory governments, the Australian Government's funding for non-government schools is paid to state and territory governments under Section 96 of the Constitution. States and territories then distribute funding to their government schools and to non-government schools on behalf of the Australian Government in accordance with the Australian Government's funding formula.

The Australian Government and state and territory governments share an interest in monitoring the governance and financial arrangements in schools to ensure public funding from both Commonwealth and states and territories, is used for the purpose of education and for the benefit of students. This interest also intersects with the ACNC due to its legislative responsibilities for the not-for-profit and charity sector.

Legislative Framework for Schools

Under the Education Act, an approved authority for a school is the legal entity the Government holds responsible for the administration of the school. Approved authorities must meet their legal responsibilities under the Education Act and the *Australian Education Regulation 2013* (Education Regulation). Section 75 of the Education Act outlines basic requirements for non-government schools including, but not limited to, that the organisation is not-for-profit, is financially viable and that the person responsible for the organisation is a fit and proper person. Approved authorities are also required to meet ongoing policy (Education Act, Section 77) and financial requirements (Education Act, Section 78) to continue to be funded under the Education Act. The department conducts a range of ongoing assurance activities to ensure approved authorities are complying with these obligations ([Appendix A](#) refers).

Due to their constitutional responsibilities, state and territory governments have requirements that non-government schools must meet to gain and maintain registration to be able to operate a school. Many of these requirements parallel the requirements of the Education Act and the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act). For example, the *NSW Education Act 1990* and the *Victorian Education and Training Reform Regulations 2017* contain sections relating to the financial viability of a school, the not-for-profit requirements, and that the responsible person for the school is a fit and proper person or body (Section 47 and Schedule 2 respectively).

The clauses in state and territory education legislation also contain greater detail on the operational registration requirements of the school, for example that school premises and buildings are satisfactory and that schools have appropriate welfare policies and procedures that comply with state or Commonwealth laws (*Victorian Education and Training Reform Regulations 2017, Schedule 2*). While these operational elements are within the purview of state and territory governments, there is overlap between the Australian Government, states and territories, and the ACNC with respect to elements of whether a non-government school is eligible for registration.

The harmonisation of registration practices for the non-government school sector is one example where there is opportunity to reduce administrative requirements on the sector and address duplicative effort across government. Importantly, harmonisation supports the core legislative principles to maintain, protect and enhance public trust and confidence in the not-for-profit sector (*Australian Charities and Not-for-profits Commission Act 2012* and *Australian Education Act 2013* – Preamble)

Recommendation 1: Aligning Regulatory Activities

Due to parallel interests in the non-government schooling sector, there is opportunity for the department, state and territory governments and the ACNC to explore harmonisation and reciprocal recognition of regulatory activities.

Compliance, Reporting and Data Collections

To minimise the reporting burden on the non-government schooling sector, the department and the ACNC have worked together to refine financial data collection arrangements so that a single approach will satisfy both the department's and the ACNC's reporting requirements. In 2017, for the first time, a single data collection for both organisations was conducted using the department's financial questionnaire (2016 data) in a 'report once, use often' approach.

Section 150 of the ACNC Act governs the ACNC's responsibilities in relation to secrecy, safeguarding of protected information, authorised disclosure of information and the manner in which it can be disclosed. With the legislative overlap across the schooling sector between state and territory governments, the ACNC and the Australian Government, the department considers there is opportunity to explore whether the authorised disclosure clauses of the ACNC Act support effective communication among government agencies. For example, Section 150-C of the ACNC Act provides specific exemptions relating to disclosure to an Australian Government agency. However, it is unclear if those exemptions also apply to state and territory government agencies.

Recommendation 2: Cooperative Reporting and Data Collections

The department welcomes the opportunity to explore with the ACNC, and other state and territory education departments, ways in which to improve information and data sharing related to compliance activities and align legislative requirements without increasing regulatory reporting or compromising transparency and accountability.

Schooling Governance

Section 75 of the Education Act requires an approved authority for a school/s to be a body corporate or a body politic, not be run for profit, be financially viable, and be a fit and proper person to administer a school/s. The department has established processes in place to monitor and assess compliance (Appendix A refers).

The Education Act provides options, where necessary, to impose conditions on the approval of an approved authority, delay, reduce or require repayment of Australian Government funding, or revoke an approved authority's approval. These actions are subject to procedural fairness, and may be subject to review.

The preference of the department is to educate and work with approved authorities to rectify identified issues. In these situations, the department actively works with state and territory education departments, regulatory authorities and other stakeholders to assist in identifying and working with schools at risk of non-compliance. A current focus for the department will be further increasing its engagement with approved authorities to raise their awareness of their obligations under the Education Act.

Recommendation 3: Enhancing School Governance and Structures

The department would welcome the opportunity to engage with the ACNC to draw on its related experiences in establishing governance standards across the charities and not-for-profit sector (ACNC Act, Section 45-10), to develop materials and approaches to governance training for approved authorities of non-government schools.

Issues raised in the ACNC submission to the Review

On 19 January 2018, the ACNC published its submission to the review of the ACNC legislation (http://www.acnc.gov.au/ACNC/Comms/LN/LN_20180119.aspx). The ACNC submission considered a range of matters relating to the operation of the non-government schooling sector.

Objects of the ACNC Act

The ACNC submission proposes to add two objects to section 15-5 of the ACNC Act, which aim to encourage not-for-profit entities to use their resources effectively and to enhance their accountability to donors, beneficiaries and the public. The department supports the inclusion of these objects as they align more broadly with the Australian Government's aim to increase transparency and accountability of approved authorities in how they use Commonwealth funding to support education.

Definition of 'not-for-profit'

The ACNC submission proposes to establish a statutory definition of 'not-for-profit' for inclusion in legislation (Submission to the Review from the Australian Charities and Not-for-profits Commission, p23). As mentioned earlier, one of the basic requirements for an entity to be eligible for funding under the Education Act is that the entity does not operate the school for profit.

From the department's perspective the most important determining factor in consideration of not-for-profit in a non-government school context is the actual conduct of the approved authority with respect to its school(s) and the way in which funds are used.

While the definition proposed by the ACNC looks to accord broadly with departmental expectations in relation to the not-for-profit requirement under the Education Act, it may be that conduct which the ACNC considers does not preclude an entity from being registered with the ACNC may still breach requirements under the Education Act. For example, at the approval stage, registration with the ACNC may help indicate that the entity seeking approval will meet the requirement in subsection 75(3) of the Education Act. The department can also choose to investigate and consider other relevant information such as the constitution of the entity, its governance and financial management policies, loans, leases, arrangements with related parties, and other like matters.

As outlined in **Recommendation 1**, there are potential benefits to be gained through alignment of regulatory activities. The department will support actions that seek to harmonise regulatory activities between the Australian Government, the ACNC and state and territory governments.

Definition of 'Responsible Persons'

The department supports the ACNC submission recommendation to establish a clearer definition of a 'responsible person' so as to promote public trust and confidence in the not-for-profit sector (Submission to the Review from the Australian Charities and Not-for-profits Commission, p29). Section 28 of the Education Regulation outlines the expectations of a fit and proper person for the non-government schooling sector.

The proposed ACNC definition appears to set out a more stringent test to meet the requirements of a responsible person, including whether a responsible person is a resident of Australia. While such strict interpretations may be appropriate in a multinational charity or not-for-profit organisation, some of these requirements could be seen as particularly onerous for the non-government schooling sector.

For the avoidance of doubt or potential conflict and to minimise potential regulatory burden, the department would seek to ensure any revisions to the definition of 'responsible persons' reflect that where an entity is approved for funding under the Education Act, legislative requirements under that Act take precedence.

Recommendation 4: Consistent Legislative Terminology

If the ACNC review is supportive of the ACNC's submission and recommendations to establish a statutory definition of 'not-for-profit' and 'responsible persons', the department would welcome the opportunity to work with ACNC in developing appropriate wording so that respective Acts are able to operate in tandem.

Secrecy Provisions

In its submission, the ACNC proposes to amend the ACNC Act to include a provision to expressly authorise ACNC officers to disclose protected information to other government agencies (Submission to the Review from the Australian Charities and Not-for-profits Commission, pg 39 -40). The department supports ACNC's efforts to improve data sharing arrangements with Australian Government agencies. Enhancements in information sharing will assist the department with data matching, analysis and research in the course of its compliance activities, improve transparency and give confidence that public funding for non-government schools is being used appropriately.

Due to the legislative cross-over with state and territory governments, the department considers there could be potential to look at how best to share information with relevant state and territory agencies, for example, education departments. The department supports this proposal as outlined in Recommendation 2.

Interaction with the *Corporations Act 2001*

The ACNC submission notes the interaction between the ACNC Act and the Corporations Act in terms of the responsibilities of public companies and their directors. Where approved authorities are bodies

corporate, board members may also have responsibilities as company directors, depending on the authority's corporate structure.

The department would welcome a discussion on options to clarify roles and responsibilities for key individuals in charitable companies which are also approved authorities for schools. Proposals to increase transparency and information exchange on the current directors and company secretary of charitable companies would also be supported in the interest of identifying key individuals as outlined in Section 4 of the Education Regulation, improving assurance and promoting transparency.

Conclusion

The department enjoys a close working relationship with the ACNC. The expansion of the department's 2017 financial questionnaire to include data collection for the ACNC is an example of how the department, the ACNC, and the non-government schooling sector can work together to streamline reporting requirements and minimise administrative burden, while maintaining transparency and accountability.

As the legislative requirements of the Education Act, the ACNC Acts and state and territory governments operate in a similar regulatory environment, the department considers there is opportunity for greater alignment and reciprocal recognition of regulatory activities. The department would also be interested in working with the ACNC to leverage their knowledge and expertise in charity and not-for-profit governance to build capacity in the non-government schooling sector.

The proposed reforms to the objects of the ACNC Act, the definition of 'not-for-profit', responsible persons and secrecy provisions relate closely to the department's assurance framework and compliance activities, and could change the reporting requirements on the non-government schooling sector. If the review supports amending these areas, the department will work with ACNC to ensure the respective Acts are able to operate in tandem without definitional conflict.

The department shares ACNC's primary aim to maximise public confidence in the not for profit system. Continued efforts to align government oversight and share best practice across the not-for-profit and non-government education sectors will enhance confidence in the governance and administration of non-government schools.

Appendix A - Assurance Activities in Schooling

Over the next 10 years, total Australian Government recurrent funding for schools will grow from a record \$17.5 billion in 2017 to \$31.1 billion in 2027. Due to the significant investment in education by the Australian Government, the department has an obligation to ensure taxpayer’s money is being used effectively and is giving all children the educational opportunities they need to reach their full potential and help the nation to prosper.

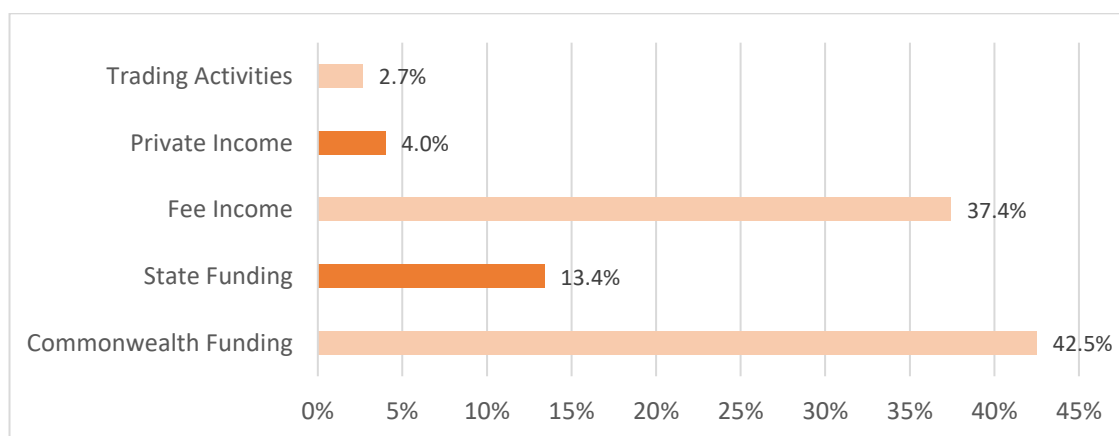
The Australian Government provides funding, calculated on the basis of need, to all eligible schools, regardless of religious or other affiliation as long as they meet the requirements set out in the Education Act. The department works with the states and territories, which have primary regulatory responsibility for schools, to ensure schools comply with their financial accountability obligations and policy commitments under the Education Act.

The department administers a responsive regulatory scheme that encourages schools to adopt high standards of corporate governance. As part of its assurance framework, the department conducts a range of monitoring and compliance activities to ensure schools in receipt of Australian Government funding are operating in accordance with legislative requirements.

Financial Assurance

On average, around 43 per cent of a non-government school’s operating income is provided through Australian Government funding with the remaining balance derived from other income sources such as student fees, donations, or state government contributions. The Australian Government’s needs-based funding model takes into account a school’s capacity to contribute and factors that into how much funding a school receives. For example, a school operating in a regional low socio-economic area would receive higher funding than if that same school was operating in an affluent metropolitan area. In many instances, and to further add complexity to this environment, a school’s income and expenses may be interwoven with other for profit activities, such as the operation of a child care centre or an outside of school hours’ care program.

Figure 2. Proportion of the Total Non-Government Sector's 2016 Reported Income



Source: Department of Education and Training’s *Financial Questionnaire*, 2017

Financial Collections

The department has developed a number of sophisticated arrangements for monitoring financial accountability and compliance with Section 78 of the Education Act through annual reporting and data collections. These include:

- an **acquittal certificate** (all approved authorities, including states and territories) which is signed by a qualified accountant to verify that Australian Government funding has been spent for the purposes of school education
- a **block allocation report** (all approved authorities that operate more than one school, including states and territories) which outlines how Australian Government funding was distributed to each member school broken down by base and loading amounts
- a **financial questionnaire** which contains financial information such as income, expenditure, assets and liabilities for each school. The department conducts a formal **annual verification exercise** on around 120 financial questionnaires to confirm the information supplied to the department is correct and to investigate and clarify anomalies
- **audited financial statements** which were collected for the first time in 2017. The audited financial statements must be signed off by a qualified and registered accountant and allow the department to further check financial health and viability as well as identify financial anomalies.

Census and census validation

Each year, the department conducts a school census to collect information on students and staff from non-government schools. The department collects data for the purposes of calculating an approved authority's annual entitlement to Australian Government recurrent funding in line with the Education Act and the Education Regulation. The data fulfils the department's obligation to provide annual reports to the Australian Bureau of Statistics. Census data for government schools is collected by the state jurisdiction and then provided to the department. Following the census, the department conducts an exercise to verify school and student data reported at census time in a random sampling of schools.

Enhancing the Compliance Framework

On 22 June 2017, the Parliament of Australia passed the *Australian Education Amendment Bill 2017* which made two significant changes to the Education Act. The first set of changes delivered new school funding and reform arrangements. The second was to legislate the establishment of a National School Resourcing Board (the Board) to provide greater independent scrutiny of Australian Government school funding to increase transparency and accountability. The Board held its first meeting in November 2017. As part of its future work program, the Board will review whether approved system authorities have needs-based funding arrangements in place which meet the requirements of Section 78(5) of the Education Act to distribute Australian Government financial assistance to their member schools.

In its performance audit report on *Monitoring the Impact of Australian Government School Funding* (December 2017), the Australian National Audit Office (ANAO) found the department's approach to minimising regulatory burden on the non-government schooling sector resulted in arrangements that do not provide a sufficient level of assurance that Australian Government funding has been used in accordance with its legislative framework (ANAO Report No 18, 2017 - *Monitoring the Impact of Australian Government School Funding*, pp 8 – 9).

The ANAO made four recommendations to:

- establish risk-based compliance arrangements to increase transparency around the allocation and use of school funding
- strengthen analysis of school funding allocation data to ensure it is distributed in accordance with need
- enforce legislative provisions to enable monitoring against the achievement of reform directions
- make better use of available data to understand the impact of funding on education outcomes and inform policy development.

The department agreed with the recommendations and noted that reform efforts are currently underway to improve monitoring the impact of Australian Government school funding and provide assurance that funding has been used in accordance with the legislative framework.

The department will work with the non-government sector, state and territory governments, and the ACNC on the implementation of changes which result in response to the ANAO's recommendations or from the Board's independent reviews.