Directed Charities and Controlled Partnerships

A Policy Brief on Charitable "Direction and Control" Regulation in Canada's International Development and Humanitarian Sector

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COOPÉRATION CANADA

Executive Summary:

Charities play important functions in Canada as social contributors and economic drivers and the portion of the charitable sector working globally in sustainable development and humanitarian assistance is no exception. Yet Canadian charities engaging in work internationally are governed by a set of regulatory and legislative provisions that may significantly restrict their ability to partner effectively in the delivery of their charitable mandate. This brief examines two specific elements of this framework: "direction and control" provisions and anti-terror legislation. Informed by a literature review, a survey of Canadian charities, and comparative research including interviews with national charity coalitions from other high-income countries, this policy brief provides recommendations for how the Government of Canada can improve the regulatory and legislative framework for Canada's charitable sector.

The following findings and recommendations arise from this analysis:

- Canada's "direction and control" provisions governing Canadian charities are unusual and possibly unique among peer countries. These provisions require Canadian charities to exercise a degree of operational control in their international partnerships that runs contrary to principles of good partnership and effective development cooperation. The Government of Canada should engage in dialogue and consultation with Canadian charities working internationally to ensure its policy on oversight of charitable resources reflects Canada's commitments to partnership and localization in development cooperation and humanitarian assistance.

- Canada's anti-terror legislation reinforces the monitoring and accountability burden imposed on charities by direction and control requirements. Broad definitions and strict enforcement procedures place charitable and non-profit organizations working in complex and conflict-affected contexts at substantial legal risk regardless of whether they have any direct relationship or contact with terrorism. This effectively discourages organizations from operating in the very areas where needs may be most urgent. These concerns are shared by a significant number of Canadian charities and most other national charity coalitions studied in this policy brief.

- There are legislative and policy reforms available to insulate charities against the unintended but severe impacts of anti-terror legislation. These should include repeal of or amendment to the Charities Registration (Security of Information) Act and an exemption to Criminal Code anti-terrorism laws and associated regulations and requirements for impartial humanitarian assistance undertaken with due diligence. As in the case of direction and control, any changes to Canada's legislative and regulatory framework governing charities should be undertaken in broad and systematic consultation and dialogue with Canadian charities.

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Introduction

Charities are woven into the economic and societal fabric of Canada. Canada's charities employ approximately two million Canadians and represent $135 billion or 8.1% of GDP. The international cooperation sector alone – including over 1,200 charities working in global sustainable development and humanitarian assistance – employs 14,000 Canadians and spends over $5 billion annually.

Charities are also core to Canada's national identity. Canadians particularly identify with the work of charities in the international cooperation sector. In poll after poll, most Canadians say they are concerned about global poverty, support international assistance, and take pride in the leadership role Canada and Canadians play in building a fairer, more sustainable, and safer world. Charities are an essential part of that collective national contribution.

A central precondition of a strong charitable sector is a legislative, policy, and regulatory environment that is fully conducive to charities realizing their full potential.[1] Currently, the governing framework for Canadian charities is the Income Tax Act. Unlike many other countries, there is no separate national legislation or commission regulating the charitable sector. Canadian charities working globally to provide development and humanitarian assistance are required to meet a variety of regulatory and legislative standards. These notably include the requirement that registered charities exercise "direction and control" over all the funds they collect and dispense, including funds channelled through them to partners, as well as specific legislative requirements to avoid fraud and prevent charitable funds from being used to commit or facilitate acts of terrorism. Charities are prohibited from using any monies to support a specific political party, and until 2018 were restricted in the amount of funding they could use for public policy advocacy and dialogue. The latter restriction was removed as part of Bill C-86, the 2018 Budget Implementation Act No. 2, as recommended by the independent Consultation Panel on the Political Activities of Charities.

Yet while progress has been made on recognizing the public policy contributions of Canadian charities – notably as a result of consultation processes that included charities – the issues of direction and control and anti-terror legislation remain potential barriers that may prevent charities in the international cooperation sector from achieving the full potential of their mandates and programs. Canada, along with the 193 other countries of the world, has committed through the 2030 Agenda for Sustainable Development to support sustainable development partnerships – including with civil society. Yet globally civic space is shrinking for charities and other organizations to do their work. Addressing the challenges presented by direction and control provisions and anti-terror legislation would meaningfully enhance civic space in Canada.

This policy brief unpacks the impact of direction and control regulations and anti-terror legislation on Canadian charities in the international cooperation sector. The brief is informed by a literature review, a survey of Canadian charities, and interviews with national charity coalitions in six other member countries of the Organization for Economic Cooperation and Development (OECD). The brief concludes with recommendations for the Government of Canada to help make the regulatory and legislative environment more enabling for charities contributing to international cooperation.

Direction and Control

Canadian Context and Issues

Current direction and control provisions concerning Canadian charities operating internationally stem from Guidance CG-002 issued by the Canada Revenue Agency (CRA) in 2010.[2] While not itself a legal text, this Guidance serves to provide the charitable sector with the CRA's interpretation of legal provisions in the Income Tax Act related to charitable registration. Section 149.1(1)(a.1) of the Income Tax Act requires that "all the resources of [a charitable organization be] devoted to charitable activities carried on by the organization itself" (emphasis added). Guidance CG-002 clarifies this requirement: a Canadian charity may enlist an intermediary to assist in carrying out its charitable purpose abroad in cases where it cannot do so directly, but there are strict conditions attached to such a partnership.[3] These conditions are captured under the heading of direction and control.

The Guidance makes the following six core recommendations for charities seeking to meet the standard of direction and control when working with intermediaries in their charitable activities internationally:

- **Create a written agreement, and implement its terms and provisions;**
- **Communicate a clear, complete, and detailed description of the activity to the intermediary;**

1 See Cooperation Canada's submission and testimony to the House of Commons Finance Committee during the 2019 Pre-Budget Consultations and on the 2018 Budget Implementation Act No. 2, as well as in its submission to the Special Senate Committee on the Charitable Sector.

2 Guidance CG-002 is thoroughly summarized in Carter, Terrance S. and Karen J. Cooper, CRA'S Revised Guidance for Canadian Registered Charities Carrying Out Activities Outside Canada, Charity Law Bulletin No. 219, ed. Terrance S. Carter, July 29 2010, http://www.carters.ca/pub/bulletin/charity/2010/chylb219.pdf.

3 Direction and control provisions also apply to Canadian charities using an intermediary to carry out activities within Canada. These are outlined separately in Guidance CG-004, released in 2011. See also Alexandra Tzannidakis, CRA *'Control & Direction' Rules Get Federal Court Bolster*, August 13 2015, Drache Aptowitzer LLP, https://drache.ca/articles/cra-control-direction-rules-get-federal-court-bolster/ for recent case law.

- **Monitor and supervise the activity;**
- **Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis;**
- **For agency relationships, segregate funds, as well as books and records; and**
- **Make periodic transfers of resources, based on demonstrated performance.**

The provisions aim to reduce the risk of abuse of the benefits of charitable status by making Canadian charities responsible for anything done with their resources. As such, they demand a substantial level of formal accountability and oversight from Canadian charities working with intermediaries to carry out charitable activities internationally.[4] Guidance CG-002 indicates that a Canadian charity that fails to meet these standards puts its charitable status under the Income Tax Act in jeopardy.

However, these requirements may also reduce the ability of Canadian charities working in the international cooperation sector to freely and genuinely partner with other organizations and communities in the Global South. Canadian charities stand to benefit from working relationships that increase their access to knowledge and resources from Southern partners and amplify their impact in developing countries and fragile contexts. This benefit is especially significant for small organizations, which often rely on long-term and trust-based relationships to implement their programs successfully.

Yet Guidance CG-002 advises Canadian charities that their charitable status requires them to contractually prescribe the activities of their partner, in advance and on an ongoing basis; to oversee and exercise authority on the activity of the partner; and to retain control over resources and limit the partner's financial discretion over resource provided. The CRA thus obliges Canadian charities operating internationally to assume dominance over their partners – who are unfortunately if appropriately termed intermediaries – rather than pursuing equal, respectful, and mutually beneficial relationships.

Moreover, the strict conditionality of the CRA's provisions on direction and control is at odds with a central tenet of effective development – local ownership. This principle has been internationally recognized through the Busan Partnership for Effective Development Cooperation and the Nairobi Outcome Document, and reinforced in the 2030 Agenda for Sustainable Development. It is also a core principle of Canada's Feminist International Assistance Policy. In the humanitarian context, direction and control provisions similarly undermine the localization agenda embedded in the Grand Bargain of the World Humanitarian Summit. Meeting bold commitments to human-rights based approaches, reaching the most vulnerable, and tackling the root causes of poverty will require changes in how charities engage in international development and humanitarian assistance. Far more will have to be done at a local level, and direction and control provisions may hinder these efforts.

Canada's direction and control requirements recently garnered parliamentary attention during a special Senate study on the charitable sector. Drawing on input from charities in the international cooperation sector, the committee's report proposes changes to Guidance CG-002 to remove direction and control requirements and move toward an "expenditure responsibility test," which would emphasize careful monitoring of financial expenditures, including by partners, rather than substantive or operational control.[5]

Canadian Charity Experience

The above concerns are reinforced by the results of a survey conducted by Cooperation Canada of Chief Financial Officers among its member organizations. Nearly all of the respondents in this survey (n=16) indicated that they were very or somewhat familiar with the CRA's direction and control requirements. While some were supportive of the requirements, seven (44%) indicated that they had concerns. Of the respondents that specified these concerns, most reflected the impact on partnership:

> ***"[The provisions] make it more difficult to operate [because Canadian organizations] can't control what is happening in the field."***
>
> ***"If carried out as CRA directs, [the provisions] would force Canadian charities to contravene international agreements that Canada has made regarding aid effectiveness … these [are] colonialist rules."***
>
> ***"[The set of provisions] increased operating cost, and limits our ability to pool funds with other organizations in an emergency situation."***

4 A select list of "qualified donees" such as other registered Canadian charities; certain registered associations and institutions; provincial, federal, or municipal governments; and United Nations agencies are exempt from direction and control provisions for financial transfers. Of course, if another Canadian charity received these funds, it would then be subject to direction and control provisions in its own allocation of those resources.

5 See Recommendation 30. This section of the committee's report cites the written brief submitted by Cooperation Canada as well as testimony from Farm Radio International and Islamic Relief Canada.

Three respondents indicated that their organization had encountered significant problems with the direction and control requirements, noting in particular the burden imposed by the requirement that receipts, books and records for overseas projects be kept in Canada (e.g. on a Canadian server).

International Context and Issues

Canada's current policy with respect to direction and control is an outlier internationally. Of the six other OECD countries explored in this research through interviews and literature review there were none with such strict regulation.[6]

The "expenditure responsibility test" referenced in the Special Senate Committee report is prima facie similar to the policy currently in effect in the United States. Auditors there focus on financial rather than operational control and have greater discretion to consider diverse factors at play in specific cases.[7]

Similar requirements are in place in the United Kingdom. The Charity Commission, the national registrar and regulator of charities in England and Wales, focuses on due diligence, monitoring, and verification of end use of funds used in international activities and through third parties, rather than operational-level direction and control. The Charity Commission also developed a suite of in-depth guidance documents and templates to clarify expectations and assist charitable leaders and trustees in meeting standards.

In 2018, the Australian Charities and Not-for-Profits Commission introduced new External Conduct Standards for Australian charities operating internationally. The first of these Standards relates to "activities and control of resources." Whereas the Guidance currently in effect in Canada mandates comparably strict direction and control of both activities and resources, the Australian Charities and Not-for-Profits Commission Standard requires "reasonable" steps to ensure that "reasonable" controls and risk management processes by partners. The Standard further notes that "reasonable steps that a charity must take, and the reasonable procedures it must maintain, will depend on its particular circumstances and the associated risks … [including] its work with third parties."[8]

The Netherlands offers another example of a relatively open approach to charitable regulation. Dutch charities working internationally are subject to three sets of regulatory provisions: basic requirements for charitable status, the Organisational Risk and Integrity Assessment of the Ministry of Foreign Affairs for implementing partners receiving government funding, and self-regulation under the Netherlands Fundraising Regulator. Only the Organisational Risk and Integrity Assessment refers directly to relations with implementing partners, requiring that "selection procedures and criteria used for selecting implementing organisations provide enough safeguard to reduce the risks to a minimum" (p. 14) The Organisational Risk and Integrity Assessment also lists ways to reduce potential risk involved in carrying out activities with implementing partners (p. 7). This approach to regulation allows charitable organizations to partner with others on the basis of due diligence rather than direct control.[9]

In New Zealand, organizations working internationally with local partners are required to demonstrate oversight, influence and awareness – not operational direction or control – of their partners' use of funds. This lighter-touch approach is complemented by a strong national effort to enhance the localization of development cooperation and humanitarian assistance by explicitly delegating authority, leadership, and control to local partners.[10] In especially stark contrast to Canada, Denmark's policy explicitly encourages Danish charities working internationally to direct as much of their resources as possible through local partners.[11]

Anti-Terror Legislation

Canadian Context and Issues

Anti-terror legislation essentially applies a legal framework to the regulatory provisions of direction and control to groups and individuals listed under national or international terrorism sanctions regimes. Under these provisions, initially adopted in the wake of the September 11, 2001 terror attacks, Canadian organizations can be held criminally responsible for the use of their resources to commit, finance or facilitate terror attacks. This legal structure has significant implications for humanitarian organizations in particular. Most obviously, the prohibition of any provision of assistance to listed individuals or groups is at odds with the humanitarian principles of neutrality and impartiality. Moreover, many humanitarian organizations work in conflict zones where listed non-state armed groups control territory; the strict prohibition of any flow of resources to or through such entities closes off entire populations to humanitarian aid.

6 The countries examined include Australia, Denmark, the Netherlands, New Zealand, the United Kingdom and the United States.

7 John Lorinc, "The Problems with Direction and Control," *The Philanthropist*, April 6, 2015, https://thephilanthropist.ca/2015/04/international-series-the-problems-withdirection-and-control/

8 The Australian Council for International Development provided useful information on charitable regulation in Australia via interviews and email correspondence in August 2019

9 Partos provided helpful guidance on the situation in the Netherlands via email correspondence in August 2019.

10 The Council for International Development provided insight on the situation in New Zealand via interview and email correspondence in August 2019

11 Interview with Civil Society in Development, August 2019.

These implications have been the subject of significant ongoing conversation in the humanitarian community, including through the Humanitarian Response Network of Canada. The humanitarian sector also raised these concerns as part of the OECD Development Assistance Committee Peer Review of Canada's Official Development Assistance in 2017-18.

The Charities Registration (Security of Information) Act (CRSIA) was introduced in 2001 as part of the federal Anti-terrorism Act. According to the Canadian government, the CRSIA's goal is to give the government a tool to address the "rare situation where classified intelligence information about terrorist activities is needed to exclude an organization from registration as a charity," and in particular, to address situations where a charity in Canada may be "used to support terrorism."[12] The CRSIA grants the Minister of Public Safety and Emergency Preparedness and the Minister of Revenue the power to sign a certificate if, based on information they have received, they believe that a charity "has made, makes or will make available any resources, directly or indirectly," to a terrorist entity or an entity engaging in terrorist activities, as defined in the Criminal Code. Such a certificate either prevents an organization from obtaining charitable status or revokes status if already granted.

Preventing Canadian charities from being used as a tool to support criminal activities, including terrorism, is an important policy goal. However, the CRSIA raises several concerns around both process and the substantive impact on charitable organizations, particularly those engaged in international development cooperation and humanitarian assistance. First, the qualification that "an applicant or registered charity has made, makes or will make available any resources, directly or indirectly" to an entity that is a listed terrorist organization or an entity engaging in terrorist activities ignores intent. Whereas wilful and knowing action are integral components of the infraction of financing a terrorist entity under s. 83.02 of the Criminal Code, they are missing from the terms of the CRSIA. This lower threshold places charities at risk of losing their status if funds are diverted, even if this occurs without their knowledge and without any wilful action on their part. In this respect, anti-terror legislation reinforces the monitoring and accountability burden imposed by direction and control requirements.

Second, the process of enforcing the CRSIA – as with other elements of anti-terror legislation – is substantially stricter than other regulatory and legislative provisions. While the certificate must be approved by a judge, there is no right to appeal on the original decision, which may only be challenged should there be a material change in the situation. This is in tension with the basic right to appeal judicial decisions afforded under most parts of the Criminal Code. The certificate can be issued based on "information" (s. 4(1)), a low threshold, and the judge "may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence." This could include secret, unsourced intelligence or hearsay. Further, – the judge is allowed to hear all evidence in private without the presence of the organization in question. The organization and their counsel are only permitted access to a summary of the information, which may be partial and the content of which is based on a recommendation from the Crown.

The issues at stake in the CRSIA are echoed in other anti-terrorism Criminal Code provisions that relate to the support and financing of terrorist entities and activities – and which apply to all organizations regardless of their charitable status. For example, section 83 of the Criminal Code, relating to terrorism offences, makes it an offence to "facilitate" a terrorist activity – but "facilitation" is vaguely defined:

> Facilitation
> (2) For the purposes of this Part, a terrorist activity is facilitated whether or not
>
> (a) the facilitator knows that a particular terrorist activity is facilitated;
>
> (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
>
> (c) any terrorist activity was actually carried out.[13]

This definition places charitable and non-profit organizations that work in complex and conflict-affected contexts at risk of contravening terrorism laws if they provide material support – which could include development cooperation or humanitarian assistance – that is ultimately used to advance terrorist aims, regardless of whether they have any direct relationship or contact with the terrorist activity.

12 Charities in the International Context, Government of Canada, 2010, https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/charities-international-context.html
13 Criminal Code of Canada, s. 83.19(1).

Not only do these provisions put Canadian charities at risk of being charged with terrorism infractions, but they may also affect the work of charities that are never charged. These laws create a challenging and restrictive environment for Canadian charities, making them less likely to operate in the very complex and conflict-affected areas where needs may be most urgent. The legal and regulatory pressure on Canadian charities is reinforced in the international cooperation sector by federal anti-terrorism clauses in Canadian funding agreements for development cooperation and humanitarian assistance.

As Cooperation Canada noted in its submission to the Special Senate Committee on the Charitable Sector:

> **"Due to vague and broad definitions, particularly around facilitation, Canada's anti-terror legislation may require humanitarian organizations to be more directive and less timely in delivering programs with local partners. Canada's anti-terror legislation can thus keep assistance from reaching the most vulnerable people affected by conflict. The cost is ultimately measured in human lives."**[14]

Canadian Charity Experience

In contrast to direction and control provisions, on which virtually all Chief Financial Officers responding to a Cooperation Canada survey considered themselves familiar, four of the 16 respondents (25%) self-reported as "not very familiar" about implications of Canada's anti-terror legislation for charities operating internationally. The level of concern was consistent, however, with eight (50%) of respondents saying that they had concerns. Where specified, most concerns related to operational contexts, for example:

> ***"[In] the locations that we operate we could unknowingly violate legislation even after the mitigation and controls we have in place."***

> ***"Even if an organization is complying with the requirements [it] is still highly likely that there will be oversight because the countries in which we are implementing our programs are very exposed to the terrorist activities."***

> ***"In many conflict zones it is impossible to work without at least engaging with organizations that may be on the terrorist list, or may have a relationship with those on the terrorist list. [It is] impossible to know what might constitute membership in such organizations … [These laws] also may force people not to tell the truth, which can endanger us and the people they work with."***

Some respondents also expressed concern about the process of listing terrorists and their organizations:

> ***"The definition of 'terrorism' itself is fraught and contested, and often the choice of which organization is on the list is highly political."***

> ***"Decisions around identifying terrorist organizations could be politicized."***

No respondents reported that their organization had experienced a significant problem as a result of anti-terror legislation. Still, the level of concern and uncertainty around these provisions is noteworthy.

International Context and Issues

Multiple reports have examined the impact of anti-terrorism laws on humanitarian aid.[15] These studies have documented how both domestic and international obligations have created numerous hurdles to providing timely support in humanitarian situations. These impacts include the following :

- **Onerous and complex administrative requirements require human and financial resources.**
- **Vetting and reporting of partners may heighten security risk for humanitarian staff, both by increasing field presence and because the impression that humanitarian actors are gathering intelligence may associate them with broader anti-terrorism strategies.**
- **Organizations may omit certain areas from their operations because they cannot guarantee that no material resources reach organizations or individuals considered associated with terrorism.**

14 Written Submission to the Special Senate Committee on the Charitable Sector, Coperation Canada, 2019.

15 A definitive study of anti-terror measures and humanitarian response is Kate Mackintosh and Patrick Duplat's 2013 Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action (UN Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council). One recent exploration, with particular attention to the United States, is Abby Stoddard, Monica Czwarno, and Lindsay Hamsik. 2019. NGOs & Risk: Managing Uncertainty in Local-International Partnerships. Washington DC: Humanitarian Outcomes and InterAction.

- **Humanitarian organizations may be forced to choose between following anti-terrorism laws or following principles of international humanitarian law – notably the principle of impartiality.**

The ultimate risk is that "people most in need do not receive the assistance they require."[16]

A key case study is Somalia between 2008 and 2011. While Somalia had long been subjected to international sanctions, the addition of Al-Shabaab to various terrorist entities lists during this period resulted in growing concerns from aid organizations about whether their operations in the country would place them in violation of domestic and international anti-terrorism laws. During this three-year period, humanitarian aid from the United States to Somalia dropped by between 50% and 88%.[17] This decline came during – and arguably aggravated – a famine in which some 250,000 people starved.[18]

Anti-terrorism legislation can hit humanitarian organizations hard financially as well: in 2018, a lawsuit against an organization that violated United States anti-terrorism laws – unintentionally, according to the charity – led to a $2 million settlement. The risk of anti-terrorism laws is real, and the potential costs are high. The enforcement of these laws, and the significant penalties applied, sends a strong message to the humanitarian community – if an organization is not able to ensure full compliance with anti-terrorism legislation, it should avoid engaging in contexts where it could incur risk. The reality is that such risk aversion would preclude responding to many of the most important contemporary humanitarian crises.

The United Nations took an important step by affirming the importance of international humanitarian law in a recent resolution on preventing terrorist financing:

> ***"[UN Security Council Resolution 2462] urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law."***

Yet this call to "take into account" does not represent a full exemption for bona fide humanitarian activities. Moreover, the very preceding clause calls for states to "periodically conduct a risk assessment of its non-profit sector or update existing ones to determine the organizations vulnerable to terrorist financing" – reinforcing the notion that this sector is a risk vector. And while UNSCR 2462 includes general reaffirmations of human rights and fundamental freedoms, little has been done to include similar protections for civil society in domestic laws.

At the national level, anti-terror laws are often broad and vague in defining terrorist entities, what constitutes support or facilitation, and to what degree development and humanitarian organizations are subject to these restrictions. The United Kingdom explicitly captures humanitarian assistance within its anti-terror requirements, as noted in its official guidance on charities and terrorism:

> ***"A charity must not provide funding or support to a partner organisation that exposes beneficiaries to activities which directly, or indirectly, promote terrorism. This is so, even if the charity's funding or support were used for legitimate humanitarian aid or other charitable activities."***

The language of "exposing beneficiaries" and "directly or indirectly" casts an extremely wide net. As one far from hypothetical example, if a patient in a hospital managed by a local partner of a British charity expressed sympathies with a designated terrorist group, the British charity could be deemed to be in criminal and regulatory violation. It is practically impossible for the charity to definitively prevent such a possibility – and all the more so while complying with the humanitarian principles of neutrality and impartiality that prohibit the screening of beneficiaries on grounds other than need.

While there is some guidance available for organizations dealing with anti-terror requirements, variance between and changes within countries makes it difficult for such guidance to go beyond sharing basic principles and case studies while affirming the importance of legal advice specific to each case. As an example, while many OECD countries – like Canada – reinforce anti-terror laws with standalone clauses in grants and contribution agreements with civil society partners, this is not true in all.

16 Emanuela-Chiara Gillard, Humanitarian Action and Non-state Armed Groups: The International Legal Framework, International Security Department and International Law Programme, Chatham House, February 2017 (10).

17 Mackintosh and Duplat, 2013.

18 Saving lives is not a crime, report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard, August 6 2018 (11).

In Denmark, terrorism is listed in such agreements as one risk factor among others such as corruption and fraud.[19] Amendments in 2017 to New Zealand's Anti-Money Laundering and Countering Financing of Terrorism Act are generally perceived to have increased the Act's impact on humanitarian organizations but many organizations – particularly smaller ones – remain unaware of the Act's full implications for their work. Some first learn about the Act itself through the Code of Conduct of the Council for International Development, which references the Act.[20] Similar to New Zealand, and to Canada, the Australian Council for International Development estimates that a significant portion of Australian organizations in its membership are only generally familiar with anti-terror legislation.[21]

Research in 2018-19 by the Australian Council for International Development and the Australian Civil-Military Centre shows that anti-terrorism legislation is impacting humanitarian practise, largely through a lack of clarity around its application to humanitarian response. A complex regulatory environment was noted as especially challenging by organizations working in Afghanistan, Palestine and Syria. In Australia and elsewhere (e.g. Denmark), anti-terror laws, charitable regulations, contractual conditions, and requirements imposed on and adopted by the banking sector create a network of policy provisions that constrain charities' ability to operate and partner freely and effectively.[22] Anti-terrorism legislation is thus a specific and significant legal obligation within a broader set of regulatory conditions constraining the activities of charities.

Conclusion

Rules and regulations to prevent the abuse of charitable status by individuals and groups seeking to do harm or abuse public trust are undoubtedly important, among other reasons to maintain public confidence in the charitable sector. However, as this policy brief has shown, direction and control provisions and anti-terror legislation constrain efforts by charities to fulfill their charitable mandates in accordance with principles of good partnership and effective development cooperation. In this sense, these provisions undermine other commitments by Canada and the charities themselves and make it more difficult to reach those most in need of the help Canada's charities seek to provide.

19 Interview with Civil Society in Development (Denmark), August 2019.

20 Interview with the Council for International Development (New Zealand), August 2019.

21 Interview with Australian Council for International Development, August 2019.

22 Interviews and email correspondence with the Australian Council for International Development and Civil Society in Development (Denmark), August 2019.

Recommendations

The following recommendations seek to balance the need for such provisions with the desire to give Canadian charities the freedom and scope to maximize the benefit they confer on domestic society and global welfare

Engage in dialogue and consultation with Canadian charities working internationally to ensure the Canada Revenue Agency's policy on oversight of charitable activities conducted by, through, and with international partners reflects Canada's commitments to equal partnership and localization in development cooperation and humanitarian assistance.

Current direction and control provisions are not aligned with principles of good partnership and effective development cooperation – and represent an outlier among Canada's global peers. These provisions should be reviewed to ensure continued accountability without undue regulatory burdens.

Repeal the Charities Registration (Security of Information) Act in favour of use of Criminal Code provisions, where necessary.

The CRSIA contains numerous substantive and procedural provisions that impose broad and strict conditions on Canadian charities. Criminal Code provisions should suffice to ensure accountability and security. In the absence of such a repeal, the following specific changes to the CRSIA should be made:

a) Add the word "knowingly" to the CRSIA's prohibition on making resources available to terrorist entities, in line with s. 83.02 of the Criminal Code;

b) Grant those named in a certificate under the CRSIA full access to the information used to issue the certificate;

c) Limit the allowable information used in determining the reasonableness of a certificate to what is normally admissible in a court of law; and

d) Open decisions about a CRSIA certificate to appeal and/or judicial review

Add an exemption to the Criminal Code anti-terrorism laws and associated regulations and requirements for impartial humanitarian assistance undertaken with due diligence.

Vague provisions in the Criminal Code around the facilitation of terrorist activities mean that the provision of humanitarian aid could constitute a legal violation. Humanitarian principles require the impartial provision of assistance on the basis of need alone. Humanitarian organizations should certainly not be funding or facilitating terrorism directly but nor should they have to demonstrate that they are excluding listed individuals and organizations from needs-based humanitarian assistance.

Limit the definition of "facilitation" in the Criminal Code to situations where the facilitator knowingly facilitates a terrorist activity.

Intent matters in law and policy – and it should matter with respect to facilitation of terrorist activity. Consistent with other Criminal Code language around terrorist financing, and complementary to the above recommendation to exclude impartial humanitarian assistance, the Criminal Code should prohibit the wilful and knowing facilitation of a terrorist activity.

Continue to consult with Canadian charities on improvements to legislation, policy, and/or regulation governing Canadian charities using a diverse array of consultation and engagement methods to include the fullest possible range of organizations and perspectives.

Engagement with charities on the need, objectives, and language for potential legislative, policy and/or regulatory reforms should be open, regular and predictable, using a variety of formal and informal approaches to support participation of charities from across the sector and across the country.

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