

Response to Development of Governance Standards Consultation Paper 2012

Submission to the Indirect, Philanthropy and Resource Tax Division of The Treasury

Response to the "Development of Governance Standards – Discussion Paper, December 2012" relating to the operations of the Australian Charities and Not-for-profits Commission (ACNC)

About this submission

This submission is made as an individual and should not be interpreted as the view of my employer.

The time frame provided for submissions to this Consultation Paper was unrealistic for many organisations as the two months chosen is a period in which there are generally no meetings of governing bodies of charities i.e. mid-December to mid-February.

This timeframe has therefore prevented me from adequately consulting with the governing body to which I report.

Those using the feedback on the Development of Governance Standards Consultation Paper should be aware that many because of the response timeframe many organisations may not have responded and their points of view will be missing from this consultation.

Responsible entity

1. The use of the term "Responsible entity" greatly confuses the language of the governance standards especially where there is a similar term "Registered entity". Terminology should be less confusing.
2. It is assumed that the term "Responsible entity" was chosen because it is possible that an organisation instead of a natural person may fill the role. Despite this possibility, the governance standards focus almost exclusively on the circumstances where the "Responsible entity" is a natural person and provide no direct guidance for when the "Responsible entity" is an organisation.

Principles-based standards

3. The definition of a "principles-based standard" is "standards which specify an outcome rather than means to achieve an outcome." The use of the word "outcome" is too restrictive for charities and puts them liable to be judged harshly where they cannot demonstrate outcomes. The term "objective" is preferred to "outcome" because it fits better with the work of charities who often are aspirational and/or who are dealing with results that are difficult to measure or verify.

Governance standards to be in place for charities to be registered

4. Section 2.3.1 of the Discussion Paper specifies that "entities will need to comply with these (governance) standards to become registered with the ACNC ..." There needs to be recognition that often the formation of charities is without any sophisticated framework being available at the time of formation and the governance framework is built on from that point.
5. A 3 month period for new charities to develop their governance framework would be more appropriate. This would allow charities to form and gather momentum rather than delaying their registration until the governance framework is fully in place. To protect public interests, a provisional registration status could be granted and certain taxation concessions could be delayed until the necessary framework was put into place.

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Draft Governance Standards: General Comment

6. In general, the draft Governance Standards are well-written and well-thought through provisions that apply governance standards to the sector that should not discourage individuals from taking on key responsibilities within charities.

Draft Governance Standard 1: Purposes and NFP Character of a Charity

7. For the sustainability and innovation of the charitable sector, there needs to be recognition that the charitable purpose of any entity should be permitted to be interpreted broadly.
8. One of the reasons for broad interpretation is that when framing the charitable purpose or mission of an organisation, the mission is often considered in general terms. An example would be "Providing housing for those in need." During that charity's operation, the responsible people may note that advocacy on behalf of its client base is a necessary activity to improve their housing prospects. If the charitable purpose is considered narrowly, the charity would be restricted from meeting the needs of its clients. A broader interpretation is preferred.
9. Charities for the advancement of religion are a particular case where the charitable purpose can take many different forms that may not be literally included in the governance document.
10. If the interpretation of charitable purpose is to be strict then it will prompt organisations to craft charitable purposes that are similar to an ambit claim and this would prove to be meaningless to any reader. Instead of preventing undesirable "mission-drift", it would establish an environment where mission-drift was more likely.
11. The other major reason for a broad interpretation of charitable purpose is because there are a wide range of possible activities that do not look like the charitable purpose that are necessary for maintaining the charity. This would include administration, property management, investment management, activities to maintain the interest and cohesion of members and stakeholders, plus fundraising and commercial-activities which generate funds used charitably.
12. With regard to the proposed standard to "comply with its purposes and its character as a not-for-profit entity", this should be assessed in terms of how resources are ultimately utilised. There should be no stipulation on the maximum size of investments or reserves of charitable organisations as reserves provide greater stability for charities and greater capacity and flexibility in the exercise of its mission.

Draft Governance Standard 2: Accountability to Members

13. While this standard is generally appropriate, it is difficult to apply to some organisations. The Anglican Church and a number of other Christian denominations have a more open concept of membership than other organisations. In the Anglican Church, membership is not characterised by membership dues, membership rolls and signed ascent to terms and conditions of membership. Consultation of members and processes to equitably include members in decision-making processes exist in the Anglican Church but they are heavily reliant on those who consider themselves to be members to opt into the process. For this reason, the standard should not require the charity to make contact directly with each member but to have processes that make information and opportunities for participation available to active and interested members.

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14. The Consultation Paper refers to the requirements in the Corporations Act to make minute books freely available to members. If this was to be a requirement, there would need to be provision for matters that involve Commercial-in-Confidence and personal privacy considerations to be withheld from disclosure.

Draft Governance Standard 3: Compliance with Australian Laws

15. There is no suggested amendment to this draft standard.

Draft Governance Standard 4: Responsible Management of Financial Affairs

16. The wording of this Standard needs amendment to “2) A registered entity must take reasonable steps to manage its financial affairs in a responsible manner with due regard to the nature and size of its financial affairs.”

Draft Governance Standard 5: Suitability of Responsible Entities

17. As mentioned previously, there needs to be clarification on how this draft Governance Standard operates when a Responsible Entity is not a natural person.

18. In Section 3.5.1 of the Consultation Paper, reference is made to the Corporations Act disqualification provisions which includes “if the person is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period of greater than 12 months.” Without intending disrespect for the laws of other countries which need to be observed in those countries, the Corporations Act approach could unnecessarily disqualify people because a country has chosen to take a harsher approach to something that would not concern Australians in the same way. This provision may unnecessarily cause difficulties for responsible officers (or potential responsible officers) because of their religious belief, sexual orientation, or outspoken advocacy in countries where these attributes and activities were not welcomed.

Draft Governance Standard 6: Duties of Responsible Entities

19. This draft Governance Standard does well in recognising that the Corporations Law approach would be unrealistic, unhelpful and too onerous for the charitable sector in general. As the charitable sector needs to operate with a sense of optimism and deals with changing income sources such as grants and donations which may need to be counted on before they arrive, the protections against irresponsible behaviour should focus on criminality and recklessness. There should be recognition that charities often operate in circumstances where there are lack of time, skills and resources to analyse actions and many actions are made in good faith with an unquantified level of risk.

Timing Issues

20. The timing provisions are adequate for most circumstances. There may need to be flexibility for charities that are required to get a court order to change the management of a trust. In circumstances where the cost of obtaining a court order is disproportionate to the benefit obtained, charities should be exempted from this aspect of compliance.

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