



Australian Bahá'í Community

Submission by the Australian Bahá'í Community on the development of governance standards for charities

The Australian Bahá'í Community welcomes the opportunity to comment on the consultation paper on the development of governance standards for charities registered with the Australian Charities and Not-for-profits Commission (ACNC).

The Australian Bahá'í Community has been supportive of the reforms being undertaken in the not-for-profit sector, and commends the Objects of the ACNC Act:

- To maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- To support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector;
- To promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

Australian Bahá'í Community

The Australian Bahá'í Community was established in 1920. As members of the Bahá'í Faith—an independent worldwide religion, founded over 160 years ago, with more than five million members around the globe—we work to promote and apply principles derived from Bahá'í teachings which are aimed at contributing to the development of a united, peaceful, just and sustainable global civilisation.

There is no clergy in the Bahá'í Faith. The Bahá'í Faith is governed by international, national and local governing bodies elected by the members of the Bahá'í Faith. The international governing body, the Universal House of Justice, is based in Haifa, Israel. The national governing body is the National Spiritual Assembly of the Bahá'ís of Australia Inc. which is currently incorporated in the ACT under the *Associations Incorporation Act 1991* (ACT). National recognition is obtained through registration under the Commonwealth *Corporations Act* as an Australian Registered Body (ARBN 009 727 128). Across Australia there are some 183 local governing bodies, known as Local Spiritual Assemblies, 47 of which are incorporated bodies under various Commonwealth and State/Territory legislations, and the remainder of which are unincorporated associations. A Local Spiritual Assembly comprising nine members is elected on an annual basis in each local government area where nine or more adult Bahá'ís reside.

It is our understanding that the majority of Bahá'í Local Spiritual Assemblies which are unincorporated associations will come under the category of **basic religious charity** and will, in accordance with the ACNC Act, not be obliged to comply with the proposed governance

standards. Those which are incorporated bodies will, on the other hand, be required to comply. The Australian Bahá'í Community is supportive of the principle – on which we assume the exception for basic religious charities is based – that government should not unduly interfere in the affairs of religious organisations. We note, however, that the distinction between “basic” and other religious charities will perpetuate certain inconsistencies between organisations which are essentially very similar. For example, under the proposed governance standards, an individual may be eligible to serve as an elected member of the Local Assembly in one locality, but ineligible to serve on the equivalent institution in a neighbouring locality, based solely on the somewhat arbitrary distinction of its incorporation status, and despite the fact that the size of the respective organisations, their financial situation and the risks inherent in their activities are the same. This inconsistency will make the task of educating and assisting our institutions to comply with the ACNC Act more complicated. This is unfortunate given that, as noted on page 8 of the consultation paper, “the proposed governance standards aim to consolidate and deliver an element of consistency to the broader governance arrangements for charities”.

Principles-based approach to governance standards

Section 2.1 of the consultation paper states:

the governance standards are intended to reflect a minimum set of outcomes for registered charities, rather than mandate ‘best practice governance’ or detailed procedures and requirements necessary for effective not-for-profit (NFP) governance. The purpose of these standards is to ensure all stakeholders can be confident that a minimum standard of governance is being met across all charities, whilst providing entities with sufficient flexibility to determine how they go about managing the charity and how to advance the charity’s purpose and achieve its objectives.

It is further stated in section 2.3.4:

The standards are principles-based in that the standards specify the outcome that registered charities needs to achieve, rather than the mechanism that achieve it. The advantage of principles-based governance standards is that they allow registered charities to decide how to achieve the outcome, taking into account their particular circumstances (including their size)...

In deciding what steps are reasonable for the registered charity to implement to satisfy the proposed standards, the registered charity would consider its size, and the extent to which it receives donations, grants and other monies from governments or the public. Other relevant factors to consider may include the risks inherent in the nature of the activities of the registered charity, and the vulnerability of those benefiting from the registered charity’s services.

The Australian Bahá'í Community fully concurs with a high-level and principles-based approach in this area. Such an approach is consistent with the Government’s earlier commitment, in the consultation paper on “Review of not-for-profit governance arrangements”, that any governance rules would be “high-level” and “principles-based”, and that they would be imposed proportionally based on such factors as the size of the entity, its turnover, the level of government support it receives, and the risks it presents by virtue of its activities. The not-for-

profit sector encompasses a diverse range of organisations and entities. Attempting to impose rules based on a standard business structure, without allowing for flexibility in implementation, would, we believe, prove not only inappropriate but counter-productive, with some entities being unable to pursue registration with the ACNC as they do not fulfil prescriptive requirements.

We find that the draft governance standards 1 to 4 are appropriate and consistent with this principles-based approach. We are concerned that standards 5 and 6, on the other hand, are prescriptive rather than high level and principles-based, and could place an unreasonable burden on charities and those who run them. We believe that the imposition of draft standards 5 and 6 in their present form would, contrary to the Government's stated intention and the third Object of the ACNC Act, add to red tape and increase compliance burdens for charities. Their impact would be particularly severe for the small volunteer-based unincorporated bodies where each responsible person is personally liable for the financial responsibilities, including any fines, of the charity. These laws have the most impact on such entities as they are currently not covered by other legislative or compliance requirements and can least afford onerous standards.

Governance standards 5 and 6

Draft governance standards 5 and 6 effectively seek to impose on charities in the not-for-profit sector expectations and requirements that the *Corporations Act 2001* places upon the directors of for-profit companies. Under draft standard 5, charities would be responsible for ensuring that persons who are disqualified from managing corporations under the *Corporations Act* – including, among others, those convicted of an offence involving dishonesty punishable by imprisonment for at least three months, undischarged bankrupts, and those convicted of an offence against the law of a foreign country punishable by imprisonment for a period greater than 12 months – do not play a role in their management. Under draft standard 6, charities would be required to take reasonable steps to ensure those who run them ("responsible entities") are subject to, and comply with, the duties imposed on company directors.

While recognising and acknowledging the need for good governance, the Australian Bahá'í Community questions the apparent assumption that there is an equivalence between the role and duties of a responsible person in a not-for-profit charity and a company director. We feel that such an assumption does not take into account the diversity of the not-for-profit sector, the resource limitations under which many small, volunteer-led charities operate, and the reality that the responsibilities and risks involved in running a charity may be quite different from managing a corporation. We are concerned that draft standards 5 and 6 are excessively onerous, both for responsible entities, and for the charities they run.

At the individual level, draft governance standard 5 may prevent rehabilitated persons from making a genuine and valuable contribution towards the running of charities, in areas where any risk to the public is very low. We also wish to point out a possible unintended consequence for our own community that could result from prescriptive implementation of standard 5. The Australian Bahá'í Community contains a significant number of members who have fled to Australia escaping religious persecution in Iran, where courts of that country have found that being a member of the Bahá'í Community is an offence for which individuals are frequently jailed on sentences exceeding one year. Under the current draft, such persons would not be eligible to serve as a member of our incorporated Assemblies unless an

exemption was sought from the ACNC Commissioner in each case. We feel that the processing of such applications would be an unnecessary and burdensome process for the Bahá'í community and the Commissioner. In such cases, we believe the charity itself is in the best position to make the decision about the individual's suitability. In the Bahá'í Faith, for example, the responsible entities are elected on an annual basis by secret ballot by all adult eligible members of the Bahá'í community they serve. No nominations or electioneering are permitted. This process inherently satisfies the stated purpose of standard 5 ensuring that "registered charities are not managed or controlled by people who present a risk to their financial position or the proper pursuit of their purposes". The prescriptive nature of standard 5 only creates unnecessary and burdensome procedures, especially for volunteer based organisations.

Given the volunteer nature of many charities, the duties imposed on responsible entities by draft standard 6, such as the expectation to make an independent assessment of professional or expert advice provided to the charity, are onerous and may well discourage or deter volunteers from taking up board positions.

With regard to their impact on charities themselves, we note that draft standards 5 and 6 would impose an even higher standard on charities than that required of companies under the *Corporations Act*. In the *Corporations Act*, the obligation to comply with the requirements disqualifying certain persons from managing corporations, and upholding the duties of directors, is placed on the responsible person rather than the corporation. Under the draft standards, on the other hand, the obligation to ensure compliance is placed on the charity itself, which can be sanctioned for breaches of the standard. We realise that this step has been taken in order to be consistent with the powers in the ACNC Act. Nevertheless, the result would be to place charities under a burden of compliance more onerous than that applied to companies, which does not appear to us to be warranted. In addition, such onerous responsibilities placed on the charity, and thereby on all responsible persons of the charity, will deter volunteers from taking on critical roles in volunteer-based organisations, to the detriment of the Australian community as a whole.

For example, under draft standard 5, responsibility would be placed on the charity itself to take reasonable steps to ensure that each of its responsible entities meet, and continue to meet, the conditions. Measures such as obtaining declarations and searching public registers of disqualified persons would be required every time there is a change in responsible entities, such as annual elections for board members. This would impose new administrative procedures every time board membership changes, an additional burden of administration for volunteer organisations. It may deter volunteers taking on the role of a responsible entity and thereby being indirectly responsible for compliance by all other responsible entities of the charity.

Similarly, under draft standard 6, the charity is made responsible for the compliance of its responsible entities with their duties. In effect, this would make board members responsible for the conduct of not only themselves, but their fellow board members as well. Adding to the complexity, it is not always clear what the reasonable steps to ensure compliance would be; or indeed how to assess duties that are not easily discernible or quantifiable such as a responsible entity making decisions in good faith for a proper purpose, or informing itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate,

or whether other responsible entities have made “independent assessment” of information under section 45.105.

Further, draft standard 6 specifies that if a responsible entity fails to meet a protection mentioned in subdivision 45-C, then the charity itself (the registered entity) is considered not to have taken all reasonable steps to ensure compliance. This is concerning, as a charity may take all the steps it can, and a responsible entity still fall short in the performance of the listed duties, for reasons entirely outside the control of the charity.

We are also concerned that draft protection 2 sub-section 45.110 (b) goes far beyond the duty noted in section 45.30 (2) (e) that responsible entities must “disclose perceived or actual material conflicts of interest”. The protection holds only if a responsible entity does not have a material personal interest in the subject matter of a decision that he or she makes, thereby requiring the responsible entity to not only disclose the conflict of interest, but to also withdraw from the decision-making process. This requirement to withdraw from the decision making process is not only inconsistent with the draft standard, but also unnecessarily prescriptive, and contrary to the Bahá’í administrative laws under which our institutions function and deal with conflicts of interest.

Recommendation

If standards 5 and 6 are to be retained, the Australian Bahá’í Community recommends an alternative, more flexible approach that enables registered entities to address the high-level principles regarding the suitability and duties of their responsible entities, each according to its purpose, size and resources, rather than imposing prescriptive requirements.

With respect to standard 5, section 3.5 of the consultation paper states that it “is intended to ensure that registered charities are not managed or controlled by people who present a risk to their financial position or the proper pursuit of their purposes”. In the spirit of a flexible and principles-based approach, we recommend that standard 5 could adopt similar language, for example stipulating that a charity must take reasonable steps to ensure that its responsible entities do not present a risk to its financial position or the proper pursuit of its purposes. The standard could point to *Corporations Act* as a possible guide to suitability, without imposing this as a mandatory set of criteria for all charities.

In relation to standard 6, section 3.6 of the consultation paper states that “Those responsible for a charity ... must be honest and careful in all their dealings on behalf of the charity, and must always act in the charity's best interests”. We recommend that standard 6 could similarly stipulate that a charity must take reasonable steps to ensure that its responsible entities are honest and careful in their dealings on behalf of the charity, make decisions in good faith for proper purposes, and believe the decisions are in the charity's best interests. The duties under the *Corporations Act* could again be provided as a possible guide without being applied in a prescriptive manner.

In order to reinforce the Government's stated intention, we further recommend that the notes to both standards include the factors to be considered in determining the actions reasonable to expect of a charity, as stated on page 8 of the consultation paper:

In deciding what steps are reasonable for the registered charity to implement to satisfy the proposed standards, the registered charity would consider its size, and

the extent to which it receives donations, grants and other monies from governments or the public. Other relevant factors to consider may include the risks inherent in the nature of the activities of the registered charity, and the vulnerability of those benefiting from the registered charity's services.

*

The Australian Bahá'í Community thanks the Australian Government for this opportunity to respond to the consultation paper. We look forward with interest to the release of the governance standards in due course.

Australian Bahá'í Community

February 2013