



A Good Beginning
for Every Child

Development of Governance Standards – Consultation Paper

Good Beginnings Australia Comments

Submission: February 2013



Development of Governance Standards Consultation Paper

DISCUSSION QUESTIONS

Draft Standard 1

1. Does draft standard one establish the appropriate principles?
2. Is the wording of draft governance standard one appropriate?

Draft Standard 2

3. Does draft standard two establish the appropriate principles?
4. Is the wording of draft governance standard two appropriate?

Draft Standard 3

5. Does draft standard three establish the appropriate principles?
6. Is the wording of draft governance standard three appropriate?

Draft Standard 4

7. Does draft standard four establish the appropriate principles?
8. Is the wording of draft governance standard four appropriate?

Draft Standard 5

9. Does draft standard five establish the appropriate principles?
10. Is the wording of draft governance standard five appropriate?
11. Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?

Draft Standard 6

12. Does draft standard six establish the appropriate principles?
13. Is the wording of draft governance standard six and the draft protections appropriate?
14. Are there any additional protections which should only be provided to volunteer responsible entities?
15. If so, what would these protections be?
16. Are the transitional arrangements proposed adequate?

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GOOD BEGINNINGS AUSTRALIA COMMENTS

Context

Good Beginnings is a national small/medium size charity that provides early intervention and parenting support programs across every State and Territory in Australia. The feedback that has been provided stems from a fundamental support of the Not-For-Profit (NFP) Sector reform and reduction in red tape. It is widely recognised that there are and will be stages to the implementation of reform and Good Beginnings is most willing to play a part in progressing the small/medium organization engagement in implementation. In particular Good Beginnings can provide a unique view due to its national positioning and understanding of the challenges at each State and Territory level.

This response provides feedback on the Development of Governance Standards Consultation Paper. It should be noted that comments are made from the perspective of the lived experience of a small to medium sized organisation organisation without detailed expertise in tax and other law. For this reason Good Beginnings also supports any submission from the Community Council for Australia which has consulted extensively on this issue.

In general Good Beginnings considers the draft standards to be appropriate, however it is noted (e.g. Standard 3, Standard 5) that there are existing Australian agencies that will have overlapping responsibility. It is strongly advocated that the ACNC take a leadership role (as it has already) in building efficiencies between agencies to avoid duplication or lack of clarity. As a small organisation Good Beginnings has experience first had the confusion of which government agency to go to for what purpose. While pro-bono legal advice is available to Good Beginnings the likelihood of uptake of the standards across the sector will be enhanced if a practical individual of any background can clearly and easily find the information and standards required.

For the purposes of transparency, Good Beginnings is a Company Limited by Guarantee and is subject to the requirements of such an organisation.

Discussion Question Feedback

Draft governance standard 1: Purposes and NFP nature of a registered entity

45.5 Standard 1—purposes and NFP nature of a registered entity

Object

1. *The object of this governance standard is:*

a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and

b) to give the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purposes.

Standard

2. *A registered entity must:*

a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and

b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and

c) comply with its purposes and its character as a not-for-profit entity.

Note Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register, in an Australian law on www.comlaw.gov.au or www.austlii.edu.au, or is otherwise made available on request.

1. Does draft standard one establish the appropriate principles?

Good Beginnings considers the principles appropriate for a relevant level of transparency.

2. Is the wording of draft governance standard one appropriate?

Good Beginnings understands from the above standard and the explanatory material in the discussion paper, that this requires it to make its purpose know to members of the public, and that by being registered with the ACNC and completing an annual information statement that it would meet this standard.

Draft governance standard 2: Accountability to members

45.10 Standard 2—accountability to members

Object

1. The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

2. A registered entity that has members must take reasonable steps to ensure that:

a) the registered entity is accountable to its members; and

b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1 The steps that a registered entity may take to ensure it is accountable to its members include holding annual general meetings, providing members with an annual report (including financial information and achievements towards its purpose) and providing for elections for its responsible entities.

Note 2 The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns include holding an annual general meeting with a question and answer session and providing an opportunity for members to propose resolutions and to vote upon those resolutions.

3. Does draft standard two establish the appropriate principles?

Good Beginnings considers the principles appropriate for a relevant level of transparency.

4. Is the wording of draft governance standard two appropriate?

It is appreciated that this standard provides a greater level of flexibility than the current requirements under the Corporations Act. With the notes added to clarify the Standard the wording is clear.

It is noted that there is a relationship between standard 1 and 2, and assumed that some not-for-profits may use single processes to achieve these standards (e.g. holding a public AGM that enables both members and the public to ask questions).

Draft governance standard 3: Compliance with Australian laws

45.15 Standard 3—compliance with Australian laws

Object

1. The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Standard

2. A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:
a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
b) by way of a civil penalty of 60 penalty units or more.

Note 1 See section 4AA of the Crimes Act 1914 for the current value of a penalty unit.

Note 2 While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.

5. Does draft standard three establish the appropriate principles?

Good Beginnings considers the standard appropriate in as much as all entities should comply with the law. However, it raises the question that if the ACNC is intended to work collaboratively with other government agencies, why it is necessary for the ACNC to take action when illegal activities are identified. Perhaps the standard should say that if the ACNC becomes aware of illegal activity it is required to refer the matter to the relevant agency for investigation?

6. Is the wording of draft governance standard three appropriate?

The wording is not clear without the explanatory statement accompanying it in the discussion document as it implies a superceding of existing laws that already apply.

Draft governance standard 4: Responsible management of financial affairs

45.20 Standard 4—responsible management of financial affairs

Object

1. The object of this governance standard is to ensure that a registered entity manages its resources responsibly, in a way that effectively furthers its purposes and protects its resources from misuse.

Standard

2. A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

7. Does draft standard four establish the appropriate principles?

Good Beginnings considers the standard very narrow in its application.

It would seem more appropriate to require a charity as a recipient of public money (through donors, government funding or tax concessions) to manage all the risks associated with its operations.

The example given in the discussion paper of a large environmental charity with volunteers which takes out insurance to manage the financial risk associated with possible injury. In this example it would seem to be a reasonable public expectation (and consistent with established Australian Workplace Health and Safety law) that the charity not only has insurance but puts in place reasonable strategies to manage the risk of injury to the volunteer.

8. Is the wording of draft governance standard four appropriate?

Subject to the comments regarding the narrowness of the standard (see above), the wording is clear for its purpose.

Draft governance standard 5: Suitability of responsible entities

45.25 Standard 5—suitability of responsible entities

Object

1. The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

2. A registered entity must:

a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and

b) after taking those steps:

i) be, and remain, satisfied that each responsible entity meets the conditions; or

ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Examples of reasonable steps

Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.

3. Subject to subsection (5), the conditions for each responsible entity are that it is not:

- a) disqualified from managing a corporation, within the meaning of the Corporations Act 2001; or*
- b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).*

Note Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

4. The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:

- a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and*
- b) the entity has been given notice of its disqualification by the Commissioner; and*
- c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.*

5. Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.

6. An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

Subdivision 45-D Register

45.150 Register of disqualified responsible entities

1. The Commissioner must maintain a register, to be known as the Disqualified Responsible Entities Register, in which the Commissioner must include the following information:

- a) the name of the entity disqualified by the Commissioner from being a responsible entity of a registered entity, under subsection 45.25 (4);*
- b) the date that the entity was disqualified by the Commissioner;*
- c) whether the disqualification remains subject to review, under Part 7-2 of the Act.*

2. The Register must be maintained by electronic means.

3. The Register must be made available for public inspection, on a website maintained by the Commissioner.

9. Does draft standard five establish the appropriate principles?

Good Beginnings considers the principle appropriate.

10. Is the wording of draft governance standard five appropriate?

The wording clearly describes the intent of the standard.

11. Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?

In principle Good Beginnings does not see any issues with allowing the ACNC to disqualify responsible entities. In practice there would be some concern about information from multiple sources (e.g. ASIC already maintains a register of disqualified entities), and it is recommended that the ACNC work together with ASIC and other regulating agencies in the states to ensure that records are shared as much as is possible.

Draft governance standard 6: Duties of responsible entities

45.30 Standard 6—duties of responsible entities

Object

1. The object of this governance standard is:

a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:

i) the relationship between them and the entity were a fiduciary relationship; and

ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and

b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:

i) is acting to prevent non-compliance with the duties imposed on responsible entities; and

ii) if non-compliance with the duties imposed on responsible entities occurs—will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

2. A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:

a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;

b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;

c) not to misuse the responsible entity's position;

d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;

e) to disclose perceived or actual material conflicts of interest of the responsible entity;

f) not to allow the registered entity to operate while insolvent.

Note 1 This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2 Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3 For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

3. For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:
- a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
 - c) if the registered entity is a company—to the members of the registered entity; or
 - d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1 Company is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2 Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

Note 3 Part 7-6 of the Act provides for the approval of forms.

4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).

5) In this section:

insolvent has the meaning given by subsection 95A (2) of the Corporations Act 2001.

Draft protections to standard 6

Subdivision 45-C Protections under governance standard 6

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.

45.105 Protection 1

1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:

- a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
- b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
- c) another responsible entity in relation to matters within their authority or area of responsibility; or
- d) an authorised committee of responsible entities that does not include the responsible entity.

2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

45.110 Protection 2

1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:

- a) the responsible entity makes the decision in good faith for a proper purpose; and
- b) the responsible entity does not have a material personal interest in the subject matter of the decision; and
- c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and
- d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

In this section:

decision means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

45.115 Protection 3

1) A responsible entity meets this protection if any of the following are satisfied:

- a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note This protection relates to the duty mentioned in paragraph 45.30 (2) (f).

45.120 Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

12. Does draft standard six establish the appropriate principles?

Good Beginnings considers the principle appropriate.

13. Is the wording of draft governance standard six and the draft protections appropriate?

The wording clearly describes the intent of the standard.

14. Are there any additional protections which should only be provided to volunteer responsible entities?

Given that the standards are intended to be applied proportionally based on the risk profile of the charity, it does not seem equitable to also provide additional protections for volunteer responsible entities. Many are also members of other governing bodies and should be aware of the requirements of responsible entities.

15. If so, what would these protections be?

See comments above.

16. Are the transitional arrangements proposed adequate?

Transitional arrangements of 18 months seem adequate to meet these standards.



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