



Response to the
Development of governance standards
- Consultation Paper

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Mission Australia welcomes the opportunity to comment on the draft governance standards proposed for charities registered under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act). As a large national, not for profit organisation, Mission Australia has supported the establishment of the Australian Charities and Not-for-profits Commission (ACNC) and associated measures to ensure effective and transparent governance of entities operating in the not-for-profit (NFP) sector.

Support for principle-based governance

Mission Australia operates as a company limited by guarantee and is subject to the governance and regulatory requirements under the *Corporations Act 2001*. On this basis we support the proposed standards to the extent that they are consistent with the requirements of the Australian Securities and Investment Commission (ASIC). In our submission to the *Review of Not-for-profit Governance Arrangements Consultation Paper* and *Australian Charities and Not-for-profit Commission Bill 2012* we did however raise concerns about proposed governance arrangements. The consultation paper suggested responsible entities and non-executive directors of charities (including companies limited by guarantee) should be subject to more onerous governance requirements than those applied to ASIC registered companies given the diversity of the stakeholders they are responsible to. We opposed this approach on the basis that good governance of registered entities requires that directors ensure the furtherance of the purpose of the charitable entity and accountability to members in the pursuit of that purpose.

We support the principles-based approach for the proposed governance standards set out in the *Development of governance standards Consultation Paper* to the extent these are drafted and applied consistent with the objects and purposes of the ACNC and the *ACNC Act* - in particular for promoting the reduction of unnecessary regulatory obligations on the Australia NFP sector. The Consultation Paper notes that the principle-based approach to the governance standards is intended to allow registered charities to decide how to achieve the governance outcome taking into account their particular circumstances (including their size). Mission Australia considers it particularly important that the standards provide sufficient flexibility to charities to determine how best to advance their purposes and achieve their objectives as stated under paragraph 2.1.

Comments in response to the proposed governance standards

Although the proposed governance standards appear broadly consistent with the provisions of the *Corporations Act 2001* and relevant associations' legislation, we consider a proportionate approach which recognises the individual circumstances of each registered entity is needed. This would ensure the governance standards do not hinder these entities in meeting their charitable purposes. Our comments on the specific issues raised by the Consultation Paper in lieu of an individual response to the questions posed are provided below.

- *Draft governance standard 3: Compliance with Australian laws*

The draft standard (at paragraph 3.3) seeks to provide the ACNC with powers to take action against the breach of an Australian law by a registered entity. The current standard provides that a registered entity will breach the standard if it engages in activities that could result in the

organisation being charged with an indictable offence, or liable to a civil penalty of 60 penalty units or more, under an Australian law.

This approach may not be appropriate on the basis that the standard appears to apply a greater compliance burden on registered entities under the ACNC regulatory framework than would be applied by an Australian law. A registered entity will breach the governance standard even where it has not been charged with an indictable offence, or contravened a civil penalty provision, for its conduct. Compliance action could be taken by the ACNC against a registered entity where the ACNC reasonably believes that entity has engaged in conduct, and regardless of any compliance action taken under the relevant Australian law.

The objective of governance standard 3 may be more effectively achieved by confining the operation of the standard to incidents where the registered entity is convicted of a serious indictable offence or civil penalty provision. Notwithstanding, if this approach is pursued by the ACNC, Mission Australia considers it critical that the ACNC ensure that this standard promotes a proportionate response for compliance with governance standards, as stated at paragraph 2.3.5.

- *Draft governance standard 5: Suitability of responsible entities (paragraph 3.5.3)*

The draft standard seeks to ensure that those individuals who are disqualified from managing corporations, including under the ACNC Act, not manage a registered entity. Subsection 42.45(2) sets out the standard required of a registered entity to ensure the suitability of its responsible entities. The current drafting places a subjective obligation on a responsible entity to be, and remain satisfied of the suitability of a responsible entity. This approach may not be appropriate where it remains unclear how the ACNC intends to enforce a requirement for the registered entity to satisfy itself that a responsible entity meets the conditions.

Subsection 42.25(3) sets out the conditions a responsible entity must meet in order to be considered suitable. The current drafting is unclear as to whether any limitation periods may apply for disqualification of a responsible entity for managing a registered entity, in keeping with the provisions of the Corporations Act 2001 such as section 206F. Accordingly it is difficult to determine whether the disqualified responsible entity may be removed from publication on the Disqualified Responsible Entities Register following expiry of any period of disqualification.

- *Protections for volunteer responsible entities*

The Consultation Paper seeks views on whether any additional protections should be provided to volunteer responsible entities at paragraph 3.6.3. In almost all cases non-executive directors of NFPs are volunteers and do not receive remuneration other than for board travel and other related expenses. With the increasing complexity and sophistication of the charitable and NFP sectors it is critical that charities are able to attract suitably qualified directors to serve on their boards. Many of these directors come from the corporate sector and may otherwise serve in a remunerated capacity on the boards of listed and private companies. These directors provide significant expertise and value to the community through the charitable boards on which they serve.

Mission Australia considers it critical therefore that these governance standards are drafted and applied in a manner that does not discourage existing and prospective directors from this community service.

General comments

Mission Australia considers the governance standards proposed in the discussion paper achieve a reasonable balance between minimum non-prescriptive standards and appropriate governance requirements. This recognises the diversity in size, complexity and legal structures of registered entities.

Mission Australia has a robust governance charter commensurate with the organisation's size, complexity and reporting requirements under the *Corporations Act 2001*. In addition, Mission Australia has adopted the ASX Corporate Government Councils' *Corporate Governance Principles and Recommendations with 2010 Amendments* as we believe these are appropriate in assisting our organisation achieve its objects and purposes. Further it is incumbent on us to demonstrate 'best practice' corporate governance in the NFP sector.

While we support the intention of the ACNC to assist the Australian NFP sector to move to 'best practice' governance models over time, we support the minimum standards approach to allow smaller registered entities to decide how best to meet governance outcomes. Many smaller registered entities will require time and assistance to comply with the proposed governance standards. It will therefore be important that the ACNC is sufficiently resourced to provide guidance and education to assist charities in understanding and complying with the governance standards. In this regard Mission Australia welcomes the transitional provisions proposed to give charities sufficient time to ensure compliance with the governance standards.

Finally, the administration of the governance standards by the ACNC must be consistent with the objects of the organisation and the *ACNC Act*. In particular to promote the reduction of unnecessary regulatory obligations and to support the Australian NFP sector.