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The Treasury
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Via email: NFPReform@treasury.gov.au

15 February 2013

Dear Sir/Madam,

SUBMISSION ON THE GOVERNANCE STANDARDS FOR THE NOT-FOR-PROFIT SECTOR

Amnesty International Australia (AIA) welcomes the opportunity to contribute to the consultation around the Governance Standards for the Not-for-profit (NFP) Sector.

About AIA

AIA is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC). It is a company limited by guarantee under the *Corporations Act 2001* with members throughout Australia. AIA is part of the international movement of Amnesty International whose aims are for a world in which every person enjoys the rights set out in the *Universal Declaration of Human Rights* and international human rights law. We are independent of any government, political party, religious or other institution.

General Comments

AIA refers to its submission on:

- *Not-For-Profits Governance Arrangements* dated 25 January 2012; and
- *Australian Charities and Not-for-Profits Commission: Implementation Design* dated 25 January 2012.

We reiterate comments contained in those submissions that the regulation of the charitable and NFP sector should strike a balance between ensuring accountability and transparency and not creating undue administrative burdens on those organisations. Such an appropriate balance serves to facilitate an organisation achieving its charitable purposes whilst maintaining stakeholder trust and confidence.

The rules for compliance for the NFP sector should accordingly be simple and easy to understand. This ensures that precious resources are not expended on establishing how to comply with those rules. AIA commends the ACNC's principles based approach to compliance, allowing organisations the flexibility to meet those standards in ways appropriate to that organisation. The use of Notes and practical examples of compliance are central to being able to understand the standards without seeking legal or specialist advice. AIA recommends that the final version of the Governance Standards incorporate these guides.

Similarly, the graduated penalty system for breach of the rules is commended. This reflects the reality of the sector that sometimes errors or omissions can be made in good faith and rectified quickly and efficiently.

AIA also commends the ACNC's approachable and assistance oriented advisory service. This ensures that organisations are able to comply with rules without recourse to specialist advice which takes time and money better used to achieve the organisation's charitable purposes.

Responses to Questions

This submission responds to questions set out in the *Development of governance standards: Consultation Paper* (the Consultation Paper) dated December 2012, reproduced below. It follows the numbering in the Consultation Paper with the addition of sub-numbering (a), (b) etc to allow for the identification of the question being answered.

3.1.1 Page 12

3.1.1 (a) Does the draft standard one establish the appropriate principles?

3.1.1 (b) Is the wording of draft governance standard one appropriate?

3.1.1 (a)

The principles of accountability and transparency for NFPs are appropriately set out in this draft standard one. Accountability to stakeholders and members of the public is critical to the credibility and support of a charitable organisation. The necessity to demonstrate an NFPs purposes or objects as charitable are already set out in existing law and this standard reflects that requirement.

As a practical matter, the ACNC publishes the governing rules of a registered charity on its Register, making compliance with this standard simple and easy to meet.

3.1.1 (b)

Yes. Whilst the language used is quite broad, the aims and method to achieve those aims is easy to understand. The Note also provides extra guidance on compliance with standard 2 (b).

3.2 Page 14

3.2 (a) Does draft standard two establish the appropriate principles?

3.2 (b) Is the wording of standard two appropriate?

3.2 (a)

This draft standard is applicable to AIA as a registered charity with members. The draft standard meets the objects of accountability and transparency of a registered entity to its members. Annual General Meetings are critical to ensuring that members of an organisation are able to hold that organisation to account through formal lines of communication such as resolutions and Question and Answer sessions. It would not be appropriate to be more prescriptive around these lines of communication however, as each organisation will have different ways of holding this conversation depending on its size and resources. It should be left to that organisation to determine the most appropriate way of achieving open lines of communication with its members in order to be held to account to them.

3.2 (b)

Yes, however the notes are essential to understanding what is required by being 'accountable to its members' and ensuring that members 'have an adequate opportunity to raise concerns about the governance of the registered entity'.

3.3 Page 16

3.3 (a) Does the draft standard three establish the appropriate principles?

3.3 (b) Is the wording of draft governance standard three appropriate?

3.3 (a)

The draft standard three establishes the appropriate principles of trust (that a registered charity complies with relevant Australian law) and proportionality of response (to the level of breach of the law).

3.3 (b)

However it is of concern that a registered charity does not need to be found in breach of either the criminal or civil law for the Commissioner of the ACNC to take punitive action in his or her discretion. It is stated in the Consultation Paper that:

The registered charity does not need to be actually charged with an indictable offence, or given a penalty of 60 penalty units or greater, to be in breach of this proposed standard.¹

The language of the standard does not reflect this intention. It says simply that an entity ‘must not engage in conduct, or omit to engage in conduct...’ which implies that facts have been established to prove the contrary. It does not say that charges or penalties must be laid against the registered charity to be in breach of this standard as suggested by the Consultation Paper.

The standard as currently worded could create a situation where a registered charity is being prosecuted erroneously, yet still subject to punitive action by the ACNC. A higher standard of proof should be required before an organisation is subjected to two forms of action – in the courts and in the ACNC.

3.4 Page 17

3.4 (a) Does draft standard four establish the appropriate principles?

3.4 (b) Is the wording of draft governance standard four appropriate?

3.4 (a)

Yes, this principle is central to the viability of registered charities but it is questionable that it should be included in the governance standards. It is vital that registered charities properly manage the finances they attract through donations and/or government funding. Whilst AIA receives no government funding, it benefits from certain tax concessions. The credibility and ongoing ability of a registered charity to achieve its objects are intrinsically linked to how it manages its financial resources. A registered charity will not be able to do its work if donors and supporters do not believe its funds are being managed responsibly and for the purposes for which they are given.

However, the ACNC Act and the corporations law (both statute and common law) already prescribe such responsible financial management. A further bar should not be set in vague terms as appear in this standard. Rather, this requirement should refer back to existing provisions in law so that the standards are consistent and easily understood and met.

3.4 (b)

No. As mentioned above, the law already prescribes responsible financial management under the ACNC Act (requirement for the Audited Annual Financial Statement) and in the corporations law for companies limited by guarantee such as AIA. This standard is vague in its use of phrases such as ‘reasonable steps’ and ‘responsible manner’ and could create confusion. There is also the possibility that three separate levels of compliance are being established – under the corporations law, under the ACNC Act and this standard. It might be preferable to create guidelines to assist organisations achieve the principle of responsible financial management, rather than a standard which has consequences if breached (in addition to those established already in law).

¹ Consultation Paper page 15

3.5.2 Page 21

3.5.2 (a) Does draft standard five establish the appropriate principles?

3.5.2 (b) Is the wording of draft governance standard five appropriate?

3.5.2(a)

Yes. As with organisations subject to the *Corporations Act 2001* and corporations law, registered charities should also be required to have appropriate people in their leadership, such as members of their board ('responsible entities' as defined in the ACNC Act), in order to ensure that the registered charity is being responsibly managed. This too goes to the heart of stakeholders' trust and confidence that the organisation's resources are being directed towards achieving their purposes and not being vulnerable to fraud, theft or other serious mismanagement that would wrongfully dissipate the organisation's resources. Whilst many registered charities may not have as significant a volume of finances to manage as found in the corporate sector (in particular ASX listed companies), they are responsible to their donors and those they support through the pursuit of their objects that they apply the funds they receive responsibly and carefully.

3.5.2(b)

Yes. The wording of the draft standard appears appropriate to achieve the stated object. The use of examples is welcomed, as are the notes to give greater clarity to broad terms such as 'reasonable steps'. The requirements of the section are clear and easy to understand. Allowing for exceptions to the standard to be sought in relation to certain charities and their responsible entities (such as the rehabilitation charity example²) are welcomed. If it is also the case that a search of the ASIC disqualified persons register will not contain all those persons who should not hold responsible entity positions, the use of a declaration is a useful tool to meet this standard.

3.5.3 Page 21

3.5.3 Are there any concerns with allowing the ACNC to disqualify persons and maintain a disqualified responsible entities register?

3.5.3

No. This seems to be a reasonable step and consistent with the ASIC register. The only concern would in circumstances where a person had been wrongly disqualified and appeared on the register. There would need to be rigorous processes around the disqualification and subsequent register of such persons.

² Ibid page 21

3.6.2 Page28

3.6.2(a) Does draft standard six establish the appropriate principles?

3.6.2(b) Is the wording of draft governance standard six and the draft protections appropriate?

3.6.2(a)

Yes. However it may prove confusing/unclear to refer to a duty, that is a 'fiduciary duty' or relationship³, which has a well defined meaning in law, yet not create that duty. It could become confusing as to what standard is actually required. In this regard it would be preferable to set out the standard of the relationship explicitly as it pertains to the charitable sector, as regulated by the ACNC. As a general comment, requiring responsible entities to meet the same standards as the corporate sector (as mentioned in 3.5.2(a) above) is welcome given the trust that those who donate money to a registered charity hold around how those funds are directed.

3.6.2(b)

The primary concern with this standard is that it appears to set out 'some'⁴ of the directors' duties contained in corporations law and equity but does not refer back to existing definitions (other than 'insolvent'⁵) in those bodies of law. The standards being set seem appropriate to the important function that responsible entities play in registered charities, however there is a risk of confusion if it is not clearly understood under which laws these obligations sit and precisely what they are. It is foreseeable that the corporations law and equity will assist in the interpretation of these standards, but clarity should be provided in the standards themselves as to what is required to meet them. In this way, specialist or legal advice would not be as necessary in order for organisations to comply.

In addition, it is not clear whether the registered charity will always bear responsibility for the acts of its responsible entity if that person breaches the standard. There should be provision for a registered charity to absolve itself of some responsibility if the responsible entity acts egregiously inconsistently with the standard in a manner which could not be within the control of the registered charity.

3.6.3 page 28

3.6.3(a) Are there any additional protections which should only be provided to volunteer responsible entities?

3.6.3(b) If so, what would these protections be?

3.6.3(a) and (b)

AIA has no further comments to make in relation to this section.

³ Ibid page 22

⁴ Ibid page 23

⁵ Ibid page 24

4 page29

Are the transitional arrangements proposed adequate?

4.

The transitional arrangements for registered charities to bring themselves into line with the governance standards seem reasonable.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'C. Wood', written in a cursive style.

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