

**Submission to Treasury regarding the ACNC
Draft Governance Requirements**

Prepared by ANGLICARE Sydney

February 2013

1. Introduction

- a) ANGLICARE Diocese of Sydney (“ANGLICARE Sydney”) is a Christian organisation operating a wide range of community services and programs across the Sydney Metropolitan and Illawarra regions of NSW; it embodies the Christian commitment to care for all people in need, as comes from Jesus' command to love your neighbour as yourself.¹ Our range of services includes: counselling and family support services (including Family Relationship Centres); community education for families; disability case management and respite; youth services; emergency relief for people in crisis; foster care and adoption for children including those with special needs; migrant services including humanitarian entrants and newly emerging communities; English as a second language classes; aged care both through nursing homes and community services; opportunity shops providing low-cost clothing; emergency management services in times of disaster; and chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions.

2. Purpose of this submission

- a) Treasury released a consultation paper on the *Development of Governance Standards* in December 2012, requesting feedback from the sector. The following submission addresses issues raised in the consultation paper.
- b) ANGLICARE Sydney made a previous submission to Treasury in February 2012 in response to Treasury's previous consultation paper *Review of Not-for-Profit Governance Arrangements*. This previous submission set out ANGLICARE Sydney's broader comments around governance issues. It is not proposed to outline these again in the current submission.

3. General observations

- a) ANGLICARE Sydney generally favours the approach taken to the development of governance standards. ANGLICARE Sydney favours the use of principles-based standards which allows NFPs to meet the standards in different ways according to their circumstances.²
- b) However there appears to be some uncertainty around the removal of ASIC governance standards and the transition to the principles-based requirements of ACNC governance standards. The Assistant Commissioner at the recent Community Consultative session in Sydney held on 30 Jan 2013 suggested that where there are existing governance standards that apply to a charity through other prevailing legislation such as ATO or Aged Care Act, these will remain in force. The only reduction in standards will be for those charities that were covered previously under specific provisions by ASIC which transferred to the ACNC from 3 December 2012.

¹ The Gospel of Matthew, chapter 22 verse 39.

² Commonwealth Treasury, 2012, *Development of Governance Standards Consultation Paper*, p5

- c) ANGLICARE Sydney notes that the definition of a “responsible entity” appears to be limited to an individual who is a member of the governing body (a company director, a trustee), as outlined in section 205-30 of the *Australian Charities and Not-for-profits Commission Act 2012*. However further clarification is sought regarding the ongoing liability of persons previously considered liable to governance standards in such positions as Company Secretary, Treasurer, Financial Officer or Principle Accounting Officer.
- d) The ACNC Act requires charities to register under one or more of seven subtypes or categories of charity. These are:
- a charity with a purpose that is the relief of poverty, sickness or the needs of the aged
 - a charity with a purpose that is the advancement of education
 - a charity with a purpose that is the advancement of religion
 - a charity with another purpose that is beneficial to the community
 - an institution whose principal activity is to promote the prevention or control of diseases in human beings
 - a public benevolent institution, and
 - the provision of not-for-profit child care services.
- e) Guidance is now required from the ACNC regarding the implications of selecting or not selecting a particular sub type as per the Governance Standards.
- f) ANGLICARE Sydney believes that it would be useful if ACNC can establish “best practice” guidelines over time. We note that the report mentions that the ACNC will look to endorse and promote model rules and codes of conduct that demonstrate best practice beyond the minimum governance standards.³
- g) ANGLICARE Sydney affirms the emphasis placed in the consultation paper on education and guidance to facilitate compliance.⁴ It is noted that the ACNC will use its enforcement powers only to address serious cases of non-compliance, including persistent and significant non-compliance.
- h) We believe that the differential application of the draft standards depending upon whether an organisation is small, medium or large needs further consideration. This involves making the application of the standards more proportionate and making the expectations upon organisations of different sizes more explicit. This could also reduce “red tape” particularly for smaller organisations.

³ *ibid*, p9.

⁴ *ibid*, p9.

4. Comments on the draft standards

a) The Consultation Paper sets out six draft governance standards covering:

- Purposes and NFP nature of a registered entity
- Accountability to members
- Compliance with Australian laws
- Responsible management of financial affairs
- Suitability of responsible entities
- Duties of responsible entities.

b) In relation to each of the six draft standards, the consultation paper asks:

- Does the draft standard establish the appropriate principles?
- Is the wording of the draft governance standard appropriate?

a) Regarding the first Governance Standard (Purposes and NFP nature of a registered entity) it would be useful to include a decision tree or flow diagram in the guidelines outlining the process that organisations should follow to establish the Purposes and NFP nature of a registered entity.

b) To be a charity under existing law, an entity must be an NFP and have and pursue charitable purposes only. This point is significant in the context of ancillary commercially-oriented activities, an area that also requires clarification.

c) Regarding the wording of the first governance standard, the definition of "responsible entity" should be included with the Object.

d) The first governance standard should require the registered charity to reference any other binding purposes and performance standards, such as other legislation that might specifically apply to the charity, such as in relation to Higher Education or Aged Care legislation. There may also be other binding documents; for example in the case of ANGLICARE Sydney, the Anglican Synod Ordinances, which may be referenced.

e) Regarding the second Governance Standard (Accountability to members), the wording is appropriate. However in the case of our own organisation and other like organisations, the definition of "members" needs to be clarified in the context of ANGLICARE Sydney's relationship with the Anglican Diocese of Sydney and Synod. In addition, a review of which Corporations Act requirements transition to ACNC legislation will also need to be validated by the Diocese, with due consideration of the provisions of the Anglican Church of Australia (Bodies Corporate) Act 1938.

f) The third governance standard (Compliance with Australian laws) is concerned with serious and indictable offences and establishes the appropriate principles.

- g) Regarding the wording of the third governance standard, it may be helpful to give examples in the guidelines of what penalty units are worth.
- h) ANGLICARE Sydney considers that the fourth Governance standard does not establish the appropriate principles. While it is acknowledged that there will be a variety of standards across the charitable and NFP sector, this standard gives no guidance whatsoever as to what constitutes responsible financial management in various contexts. For instance, guidance should be given as to what constitutes responsible financial management for each of the three sizes of organisations: small, medium and large.
- i) Regarding the fourth Governance Standard (Responsible management of financial affairs) some further clarification around the suitability of those responsible for these standards would be appropriate given the diversity of financial skills that those responsible for charities may or may not have.
- j) Regarding the wording of the fourth governance standard, the guidelines should make reference to the necessity of a risk-based approach to limiting financial risk through the application of various processes supporting decisions and the carrying out of responsibilities associated with them.
- k) The fifth Governance Standard (Suitability of responsible entities) generally establishes the appropriate principles.
- l) There are, however, some issues around privacy that are raised later in this submission.
- m) The standard outlines the setting up of a Disqualified Responsible Entities Register but the guidelines note that a search of the ASIC Disqualified Persons register is also required.⁵ These two registers appear to have a similar function, accordingly the requirement to search both will add to 'red tape'. ANGLICARE Sydney considers that there may be merit in combining the registers.
- n) Regarding the sixth Governance Standard (Duties of responsible entities) ANGLICARE Sydney considers that the content of the opening paragraph in section 3.6 of the consultation paper should also appear in the wording of the object and standard: "Those responsible for a charity play a vital role in ensuring the charity is meeting its objectives and using its resources for its charitable purposes. They must be honest and careful in all their dealings on behalf of the charity, and must always act in the charity's best interests. Most responsible entities will already be subject to similar obligations under the general law and, in some cases, statute."⁶
- o) This draft governance standard is intended to ensure that responsible entities are subject to and, as far as possible, meet those duties. The proposed duties would be substantially the

⁵ *ibid*, p20.

⁶ *ibid*, p21.

same as the duties of directors under the *Corporations Act 2001*, particularly the provisions which will be replaced by the governance standards in relation to registered charities that are companies. These provisions are: the duty to act with reasonable care and diligence (section 180), a duty not to improperly use information or position (sections 182, 183 and 184), an obligation to disclose matters involving personal interests (sections 191 and 196), obligations in respect of related party transactions (Chapter 2E); and a duty to act in good faith, in the best interests of the company and for a proper purpose (section 181). These duties also apply in some cases by statute to incorporated associations.

- p) However, some responsible entities are also subject to higher duties or standards under other laws. This should be outlined by way of supporting guidelines or footnotes to the legislation.
- q) Those sections of the Corporations Act which transition to the ACNC legislation and the "switching off" of sections of the Corporations Act need to be specifically outlined in the guidelines. A statement regarding the overriding application of specific laws applying to activities provided by charities, such as in Health and Aged Care, would also be useful. It is important that a clear hierarchy be established in relation to different pieces of legislation and that this should then be reflected in the reporting requirements under each piece of legislation. This is another area where the "report once, use often" principle should be implemented.
- r) Regarding the wording of the sixth governance standard, further clarification is required regarding the standard of care, due diligence and the decision to incur debt, including the "going concern" test. Some cross-reference to Accounting Standards and related Corporations law may be appropriate, along with confirmation as to which Corporations law sections are "switched off". The accountability for the registered charity taking "reasonable steps" to ensure that responsible entities comply with the governance standards should also be included.
- s) The Consultation paper asks:

- In relation to Standard 5, are there concerns with the ACNC being allowed to disqualify responsible entities and maintaining a register of disqualified entities?

- t) ANGLICARE Sydney suggests that clarity around privacy issues would be useful here. It is not clear whether it is intended that the register of disqualified responsible entities will be publicly accessible, or whether names will only be revealed through matching current or proposed responsible entities. Clarity is also needed around the privacy obligations of the organisation towards a potential responsible entity shown to be a disqualified responsible entity.

u) The Consultation Paper asks:

- Are there any additional protections which should only apply to volunteer responsible entities? If so what would those protections be?

v) Further guidelines regarding the engagement, deployment, protection, training, management and termination of volunteers should be established as best practice guidelines.

w) The impact on insurance cover for volunteer Directors of the transition from the provisions of Corporations legislation to principles-based governance standards needs to be identified. The Consultation paper does not explicitly address the transition to the ACNC governance standards from the point of view of external parties such as insurance companies, banks, vendors and other contractual parties.

x) Minimum standards would also need to be clarified across the NFP sector. Many volunteers operate in NFP's that are not yet under the jurisdiction of the ACNC. There could be advantages to developing guidelines which would be applicable to the whole sector.

5. Timing Issues

a) The Consultation paper asks:

- Are the transitional arrangements proposed adequate?

b) ANGLICARE Sydney's submission has raised several issues related to transitional arrangements, including the need for clarity around:

- The process that organisations should follow to establish the Purposes and NFP nature of a registered entity, including taking into account other legislation and binding documents
- Selection of charity sub-types and the implications of selection and non-selection
- Continuing liabilities for responsible entities under other pieces of legislation
- The liabilities of volunteers both in the context of being responsible entities and as operatives of a charity (and or NFP)
- The standard of care, due diligence and the decision to incur debt by responsible entities and the financial skills needed for responsible management of financial affairs

- The transition to the ACNC governance standards from the point of view of external parties such as insurance companies, banks, vendors and other contractual parties.
- c) From the perspective of establishing best practice guidelines, the ACNC may be putting smaller charities at risk in terms of ability to attract donor dollars by virtue of not being able to afford compliance “machinery” and an ancillary marketing vehicle that larger organisations might be able to afford. The standards therefore should support the notion that entities are expected to justify and comply with standards commensurate with their purpose and size in the context of their stakeholders’ requirements.

6. Conclusion

- a) ANGLICARE Sydney appreciates the opportunity of participating in the consultation process and trusts that this submission will be of assistance in shaping the final governance standards.

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