

12 February 2013

Manager  
Philanthropy and Exemptions Unit  
Indirect, Philanthropy and Resource Tax Division  
The Treasury  
Langton Crescent  
**PARKES ACT 2600**

**Federal Government Consultation Paper December 2012 -  
'Development of governance standards'**

**Submission of the Lutheran Church of Australia Incorporated**

**1. LUTHERAN CHURCH OF AUSTRALIA INCORPORATED**

The Lutheran Church of Australia Incorporated (LCA) is involved in a diverse range of altruistic charitable activities throughout Australia. This work is spread across various forms of legal structure and jurisdictions. Motivated unashamedly by the gospel of the Lord Jesus Christ, the LCA embraces all of the following:

- Promotion of faith development and spiritual well-being.
- Development of the local church and God's wider Church.
- Various ecumenical faith endeavours.
- The relief of hardship, poverty and societal injustice.
- Caring for the aged and infirmed.
- Provision of international aid and relief.
- Provision of faith based primary and secondary school education.
- Theological and vocational education and training.

The activities of the LCA find their form in a range of faith based organisations and this includes:

- Local churches and communities.
- National and State church ministry organisations.
- National college for theological training and accreditation.
- Schools and colleges.
- Welfare organisations.
- Residential aged care organisations.
- Organisations devoted to finance, fundraising, administration and governance.

## **1.1 Diversity of legal forms**

This submission represents the views of the Lutheran Church of Australia Incorporated encapsulating its role in all of the above-mentioned activities.

The LCA operates across a diversity of legal forms including the following:

- Incorporated Associations under the South Australian Association Incorporations Act together with a range of state based Acts.
- Companies Limited by Guarantee under the Corporations Act of Australia.
- Charitable Trusts and Prescribed Public and Private Funds.
- Unincorporated agencies or Departments of the Church.
- Entities established under specific acts of parliament in various jurisdictions.

The ‘family’ of LCA organisations are typically grouped together through confessions of faith and via constitutional links to the Lutheran denomination.

## **1.2 Governance structures within the LCA**

The Lutheran Church self-funds much of its faith-based activities and relies on the generosity of its constituent members to a very high degree. This reliance is in the form of donated resources which includes financial giving, volunteer time and significant skill and acumen.

The LCA of course receives no direct government contribution in relation to spiritual formation and endeavours of faith including administration and development of church activities. In other areas of service, the Lutheran Church works in partnership with government and semi-government funding bodies together with supporters, to bring significant relief and contribution to the community.

The reliance on volunteer skill and acumen is most acutely felt in relation to those charged with governance. The various volunteer governors within the LCA absorb much responsibility in the absence of financial reward. This applies to all activity of the LCA including pure ‘religious’ activity or community services. In some cases, the responsibilities are significant and require high degrees of professionalism and competence.

At the outset of its response to the governance consultation paper, the LCA pays tribute to its volunteer governors. The LCA observes that it is becoming increasingly more difficult to attract competent volunteers that are willing to absorb significant responsibility and perceived personal risk commensurate with the needs of registered charities.

The significant season of change within the charitable sector may accentuate this phenomenon.

In the opinion of the LCA it is a vitally important principle that the ACNC strikes an appropriate balance in providing supportive guidance to the sector while ensuring propriety of governance standards. The LCA is strongly supportive of a regime that honours volunteer governors and that cultivates and attracts future leaders to the sector.

## **2. COMMENTS ON THE CONSULTATION PAPER**

The LCA recognises the basis upon which the draft governance standards were compiled. Some key observations in this regard and associated comments are as follows:

- It is recognised that the standards are designed to provide a framework for *minimum* governance standards rather than mandate ‘best practice’ governance. It is important that the standards continue to emphasise this position and do not provide a mandate for entities to settle for governance standards that are below ‘best practice’.
- The standards being ‘principle based’ give strong scope for interpretation and customisation. This is generally seen as appropriate but may lead to subjectivity in relation to what is considered acceptable methodology for a charity to meet the relevant standards. This will inevitably rely on the good judgement of those charged with governance of the charity. It will also be significantly aided by the mooted plans of the ACNC to provide strong positive guidance material in relation to all aspects of the governance standards.
- It is noted that the ACNC has provided in the consultation paper some preliminary guidelines in determining what steps are reasonable for a registered charity to implement in order to satisfy the proposed standards. These are loosely identified at pages 8 and 9 of the consultation paper as follows:

“.....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 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.”

It is noted that the ACNC intends to provide more substantial guidance in these areas and to produce appropriate guidance material to assist charities. The LCA strongly supports the notion of providing guidance in this manner, particularly in relation to volunteer governors.

- The notion of making governance standards homogenous across the charitable sector is strongly supported, notwithstanding the need for some differentiation to be retained. In this regard, the impact of legal structure, entity type, jurisdiction, affiliation and sector of operation are all strongly relevant. The LCA supports the principles of increasing consistency and to differentiate governance standards based on principles of substance rather than form.

## **2.1 Basic religious charities**

The LCA notes that the governance standards will not apply to ‘basic religious charities’ as defined by the ACNC Act. While this concept is considered appropriate and is appreciated, the LCA wishes to make comment in relation to the propriety of the definition.

The definition of ‘basic religious charity’ contained in Section 205-35 of the Act is considered extremely narrow by the LCA. Among other attributes, it would appear that any of the following would preclude a church entity from the definition:

- Being incorporated either under the Corporations Law or state based Act pertaining to incorporated associations.
- Any entity that has a diversity of activity to the point where it may be entitled to registration as a charitable entity under different types of activity in addition to ‘the advancement of religion’.
- Where the entity is a deductible gift recipient, notwithstanding some exclusions.
- Where it engages or receives certain types of funding.

Attributes of this definition render the general exemption to be broadly ineffective and token. This is particularly pertinent with respect to legal structure. In this regard, the LCA makes the following observations:

- The selection of legal structure should not of itself be a decisive signal that an organisation in any way should be considered more than ‘basic’ by its nature.
- It is in fact reasonable for a ‘basic’ church entity to select a simple legal structure that does little more than provide it with legal autonomy and identification in the Australian financial system. For example, unincorporated entities have much more difficulty in relation to operating banking accounts and obtaining basic registrations with the Australian Taxation Office.
- It should be substance rather than form that drives the definition of ‘basic’ religious charity.

The LCA contends that the exemption from governance standards afforded to basic religious entities is a well-founded principle. The LCA would strongly encourage the ACNC to consider widening the definition to those entities that exist for the fundamental purpose of ‘advancement of religion’ and includes those that are separately incorporated. Certainly the definition should embrace those that are merely incorporated under state based incorporation legislation.

It is suggested that a more quantitative definition of ‘basic religious charity’ might be appropriate in the nature of financial reporting thresholds. In this regard, it is noted that a ‘small’ charity under the ACNC legislation is considered to be one with annual revenue of less than \$250,000 per annum. This may be an appropriate threshold for basic religious organisations to be considered appropriately exempt from governance standard requirements.

### **3. SPECIFIC REMARKS IN RELATION TO DRAFT GOVERNANCE STANDARDS**

Specific comments are made below in relation to each governance standard as requested in the consultation paper. The questions are taken directly from the paper as requested.

#### **3.1 Draft Governance Standard 1: Purposes and NFP character of a charity**

##### ***Comments:***

It should be recognised that in some instances, the existence of a registered entity does not stand alone but is subservient or constitutionally connected to another. This is generally the case within the LCA whereby some organisations are considered ‘agencies’ of the LCA and exist to meet the altruistic purposes of the wider church rather than a defined set of persons.

Within the LCA there are a number of organisations that exist to serve the purposes of the ‘church’ and the church exists to promote religious faith and spiritual formation.

##### ***Question 1 – Does draft standard one establish the appropriate principles?***

Yes. The LCA is strongly supportive of ensuring a registered charitable organisation can demonstrate its purposes and character. It should be incumbent on a registered entity to be able to provide or make available relevant information to achieve this.

An organisation should also ensure that it holds true to its objects and does not allow ‘mission drift’ that undermines its charitable status. Imposing governance responsibility in this regard is entirely reasonable.

For basic religious organisations, the demonstration of purpose and character is self-evident due to the unique disposition and inherent existence as a ‘faith’ community. This seems to underscore the observations made above in relation to ‘basic religious charities’.

***Question 2 – Is the wording of draft governance standard one appropriate?***

Generally yes. It is curious that the standard refers to ‘not-for-profit’ entity but does not identify ‘charitable’ entity. This seems slightly inconsistent with the current charter of the ACNC which appears to initially be focusing solely on charitable entities and registrations.

### **3.2 Governance Standard 2: Accountability to members**

***Comments:***

Within the LCA the concept of ‘membership’ is secondary to the concept of ‘constituent’. In this regard, some charitable entities define their governance through membership. This is particularly the case in relation to incorporated associations where membership and governance can be constructed to be synonymous.

The spirit of governance standard two is most relevant to organisations where there is a separation between governance and constituent interest. This may therefore require some thought or definition in relation to the construction of the governance standard.

The applicability of this principle to various legal forms is briefly commented on as follows:

- A company limited by guarantee may only have one official member, which may be another institution. The existence of a single member may not therefore preclude the propriety of an accountability mechanism to a wide range of interested constituents or parties.
- Even though other legal forms such as charitable trusts may not be defined by ‘membership’ the principle of accountability to constituents may be defined by the trust’s deed to which the objects of the trust are directed.

***Question 1 – Does draft standard two establish the appropriate principles?***

Yes. The principle of accountability is strongly supported by the LCA.

***Question 2 – Is the wording of draft governance standard two appropriate?***

Some consideration may need to be given to the concept of expanding the accountability mechanism to ‘constituents’ and made more applicable across variable legal structures.

### **3.3 Governance Standard 3: Compliance with Australian laws**

#### ***Comments:***

It is in the interests of all charities to ensure that minimum governance standards provide integrity with respect to lawful conduct and activity. It is recognised that this principle is targeted at conduct of the charity rather than its governors.

It will of course be crucial to ensure that the standard in practice does not penalise the very persons to whom it is directed. That is, to ensure that breaches in governance do not penalise the intended benefactors or constituents of the charity.

#### ***Question 1 – Does draft standard three establish the appropriate principles?***

Yes.

#### ***Question 2 – Is the wording of draft governance standard three appropriate?***

It is difficult to comment on the propriety of wording in respect to the standard and the relevance of '60 penalty units or more' without also being aware of commensurate enforcement action that may be applied.

### **3.4 Governance Standard 4: Responsible management of financial affairs**

#### ***Comments:***

This area is extremely broad and the governance standard is pitched at a macro level. In reality, it is likely that responsible management of financial affairs will be a function of a charities activity and the sector within which it operates.

A clear example in this area would be the Aged Care sector. Registered charitable organisations that operate within this sector have very strong financial and prudential requirements under the Aged Care Act 1997 as administered by the Commonwealth Department of Health and Ageing. The benchmark for financial prudence in this sector would be set much higher than under any generic governance standard.

Other registered charities would derive financial responsibilities from specific funding arrangements and legislative scope.

This is clearly an area where the standard of governance would be appropriately influenced by the size of the entity, the risks it presents by virtue of its activities together with turnover including extent of government funding support.

***Question 1 – Does draft standard four establish the appropriate principles?***

Yes.

***Question 2 – Is the wording of draft governance standard four appropriate?***

Yes.

The LCA feels that in this area some prescription as to what ‘reasonable steps’ will be appropriate at different times is going to be crucial.

Guidance in this area may simply encourage a registered charity to undertake a ‘scoping’ exercise in relation to relevant legislation and contract review to formulate its own ‘best practice’ compliance standards.

### **3.5 Governance Standard 5: Suitability of responsible entities**

***Comments:***

The LCA supports the principles that underpin this standard and the desire to maintain, protect and enhance public trust through appropriate governance standards. While it is extremely difficult to mandate propriety, there are few choices available to the regulator but to take a prohibitive disposition where appropriate.

In some instances it may be appropriate to define in a more positive manner what skills or qualifications are expected from governors of registered charities. It is acknowledged that this would be more conducive to ‘best practice’ principles rather than ‘minimum standards’.

***Question 1 – Does draft standard five establish the appropriate principles?***

Yes.

***Question 2 – Is the wording of draft governance standard five appropriate?***

The LCA is generally supportive of the wording. It would in our view be helpful to refer to responsible ‘persons’ or ‘individuals’ rather than ‘entities’. The word ‘entity’ can be misleading in this context as this principle clearly pertains to the propriety of individual persons acting in a position of governance.

***Question 3 – Are there concerns with allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register?***

These provisions including the appeal provisions seem reasonable.

If it is considered an appropriate reasonable step by a charity to search public registers in relation to appointing governors, it will inevitably be important that the ACNC provide an easy mechanism for doing so. The maintenance and easy access to a Disqualified Responsible Entities (persons) Register is supported by the LCA.

### **3.6 Duties of responsible entities**

***Comments:***

It is reasonable and important for governance standards to address and make functional the critical need for governors to be made aware of their duties and responsibilities. The importance of flexibility and proportionality is strong in this area as ‘reasonable steps’ are dictated by a range of circumstances and scale of activity.

Aligning duties with those applicable to Directors under the Corporations Act emphasises the nature of ‘principle based’ governance. In this regard, the potential impact of disproportionate responsibility with no or little reward may preclude the sector from recruiting sufficient competent governors in the future.

The fulfilment of the ACNC charter in this area with respect to education and information is very important. This would appear particularly relevant with respect to conflicts of interest and awareness of fiduciary duty.

It is in this area that governors face the most risks. The protection measures are therefore crucial.

***Question 1 – Does draft standard six establish the appropriate principles?***

Yes.

***Question 2 – Is the wording of draft governance standard six appropriate?***

Yes. Once more, use of the word responsible ‘persons’ or ‘individuals’ appears more appropriate than ‘entity’ in the context of those charged with governance.

***Question 3 – Are there any additional protections which should only be provided to volunteer responsible entities?***

The ability of an organisation to indemnify governors is precluded by some legislation. It would be helpful if the ACNC undertook a review of the situations where it is appropriate for volunteer governors to receive indemnity.

The exclusive nature of LCA governors being volunteers is once more emphasised.

#### **4. TIMING**

The consultation paper makes it clear that the commencement of governance standards will apply from 1 July 2013. The transition time of 18 months and the four year period to amend governing rules are commensurately appropriate.

***Question 1 - Are the transitional arrangements proposed adequate?***

Yes.

#### **5. SUMMARY**

A summary of the LCA position in relation to the Commonwealth consultation paper - 'Development of governance standards' as relevant to charities that are registered with the ACNC is as follows:

- 1. Registered charities have a responsibility for ensuring their entitlement to tax concessions is underpinned by pure altruistic purposes and strong adherence to appropriate governance.**
- 2. The LCA is strongly supportive of the principles based approach to governance standards.**
- 3. Recognition that the vast majority of charities rely on the diligence, skill and acumen of volunteers is a crucial matter when cultivating positive regulation of the sector.**
- 4. The general exemption offered to 'basic religious charities' is definitionally restricted and requires review and expansion.**
- 5. There is a distinct difference between 'membership' and 'constituency' in some charities and this requires consideration in relation to accountability measures and other aspects of the governance standards.**

6. **After settling the governance standards the provision of substantive guidelines to the sector in relation to meeting the standards will be highly important.**
7. **The provision of guidance and resources to registered charities will be most pivotal in the areas of compliance with Australian laws and responsible management of financial affairs. This could be sensitive to frameworks that differentiates across sectors or scale of activity.**
8. **Assisting registered charities with streamlined resources in the area of identifying and responding to ‘disqualified persons’ is strongly favourable.**
9. **The ACNC should consider a much stronger investment into education and guidance rather than compliance and enforcement during the transition period.**

The LCA appreciates the opportunity provided to make this submission.

Yours sincerely,

**Lutheran Church of Australia Incorporated**

A handwritten signature in black ink, appearing to read 'Peter Schirmer', written over a vertical line that serves as a placeholder for the signature.

Per

**Peter Schirmer**  
Executive Officer