

**Submission to The Treasury
Development of Governance Standards
Consultation Paper
December 2012**



15 February 2013

CCSA, 77 Parke Street Katoomba (PO Box 118) NSW 2780
Ph: (02) 4782 1470 or 1800 991 602 Fax: (02) 4782 4425
Email: office@ccsa.org.au

Contents

1.	About CCSA	3
2.	Introduction.....	3
3.	Response to Questions	4
3.1	Draft Governance Standard 1: Purposes and NFP Character of a Charity	4
3.2	Draft Governance Standard 2: Accountability to Members	4
3.3	Draft Governance Standard 3: Compliance with Australian Laws.....	4
3.4	Draft Governance Standard 4: Responsible Management of Financial Affairs	5
3.5	Draft Governance Standard 5: Suitability of Responsible Entities.....	5
3.6	Draft Governance Standard 6: Duties of Responsible Entities.....	6
4.	Timing Issues	7
5.	Conclusion	7

1. About CCSA

CCSA is a peak body with a vision for best practice management in early childhood education and care (ECEC). We do this through the provision of integrated management, workplace relations, governance and operational support to early childhood education and care services.

CCSA has been operating for more than 42 years and has a strong knowledge of the issues faced by children's services in rural, remote and regional areas. We run an annual program of regional training including forums and workshops and consultancies. CCSA has a strong base of knowledge and experience in these regional areas, a close relationship with its member services and a continuing commitment to regional and remote NSW. Currently CCSA has 600 members across NSW.

CCSA operates Business Solutions, which provides accurate and timely payroll and bookkeeping services, providing further effective financial management support for members. CCSA also plays a leadership and advocacy role at a state and national level in order to advocate for a sustainable legislative, regulatory and funding framework that ensures high quality and well managed early childhood education and care and one that recognises the contribution of early childhood education and care to their local communities.

CCSA participated in the ACNC face-to-face consultation forum in Sydney. This submission in response to the Consultation Paper complements our comments at that time.

2. Introduction

CCSA believes it is imperative that both managers and committees understand their role within the context of the governance model and its overall purpose - clarity and understanding provide the foundation for effective governance and management.

The AICD *Director's Social Impact Study 2011* stated that non-Executive directors on not-for-profit Boards spend approximately 7 working weeks a year on their duties, 90% of these on a voluntary basis. It is interesting to note that 50% of respondents to the survey thought the quality of Governance was as effective as for-profits. It is also interesting that the level of complexity faced by directors on not-for-profit boards was considered to be higher than that faced by directors on boards of for profit companies.¹

Community managed services and other not-for-profit (NFP) governance structures are capable of operating well if a flexible structural framework is provided by government which recognises and supports the importance of effective governance and management. However, in doing this sometimes things can be too flexible leaving people and organisations floundering on how to actually meet requirements. In this case it is essential to have best practice guidelines that people can refer to.

If we require good governance then we need to enable it.

¹ Australian Institute of Company Directors, *Directors' Social Impact Study 2011*, <http://tinyurl.com/77jz724>, viewed 15 November 2011.

3. Response to Questions

3.1 Draft Governance Standard 1: Purposes and NFP Character of a Charity

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

The principles and standard and are consistent with existing laws requiring charities to have a 'charitable purpose' and being required to demonstrate how they meet this purpose.

The wording of the draft governance standard one is appropriate.

3.2 Draft Governance Standard 2: Accountability to Members

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

CCSA agrees with the comment that a charity currently meeting the requirements of the *Corporations Act 2001* or a State Act governing incorporated associations, will comply with the proposed standard. However, the proposed standard is a minimum and it is possible that over time charities will drop their current practice to meet the minimum requirements of this standard – after all it will be easier. It appears that, in seeking flexibility for charities, current requirements risk being watered down.

CCSA agrees that the flexibility provided by this standard and principles are positive but prefers to see this standard have some stronger compliance requirements. For example, requiring at a minimum that an annual report is produced and an annual general meeting is held. However, aspects such as how the meeting is called, the manner in which it is held, quorum requirements etc should be flexible to allow for difficulties faced by rural and remote services in such instances.

3.3 Draft Governance Standard 3: Compliance with Australian Laws

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

CCSA supports the principles and standard, however we are concerned that its current wording only applies to the registered entity (NFP) itself and not to individual responsible entities. Currently, there is nowhere for not-for-profits boards to take issues when responsible entities are breaching good governance. Therefore, if the ACNC is the regulator of the NFP sector it would make sense for it to be clearly identified in draft governance standard 3 as being able to enforce the requirement for compliance with Australian Law not only against the charity but the responsible entities as well. This would be particularly valuable for smaller, less well-resourced charities such as those that are the predominant type in the ECEC sector.

CCSA is also concerned that the principles of natural justice are being removed. We note the statement 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 ... if the ACNC reasonably believes a charity has engaged in an offence of fraud, the charity would be in breach of the governance standards and the ACNC could take action.*' Therefore action can be taken by the ACNC even if an illegal activity is not proven to have occurred but is 'reasonably believed' to have occurred. It would be more appropriate that action is taken where the charity may not be charged or face a penalty but where an activity is proven to have occurred.

As previously stated in our comments on draft governance standard 2, the proposed standard is a minimum and it is possible that over time charities, particularly smaller entities with fewer resources, will drop their current practice to meet the minimum requirements of this standard – after all it will be easier. It appears that, in seeking flexibility for charities, current requirements risk being watered down.

3.4 Draft Governance Standard 4: Responsible Management of Financial Affairs

7. Does standard four establish the appropriate principles?

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

The principles and standard are consistent with existing laws requiring how charities manage their financial affairs. However, smaller and less well-resourced charities would benefit from greater guidance as to what constitutes responsible management. Consideration should be given to including some of the explanation in the Consultation Paper as notes to the Standard. This would be similar to the approach that has been taken in Draft Governance Standard 5 where *Examples of reasonable steps* have been included in the Standard.

3.5 Draft Governance Standard 5: Suitability of Responsible Entities

9. Does 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?

The principles and standard are broadly consistent with existing laws and approaches to disqualifying persons from managing corporations at both a federal and state level. CCSA believes that a diminution of the responsibility of persons managing corporations should not occur simply by virtue of the corporation being a charity. CCSA therefore supports the maintenance of a comprehensive *Disqualified Responsible Entities Register*.

The wording of the governance standard could make it clearer though as to how the *Disqualified Responsible Entities Register* will interact with ASIC's separate register of persons disqualified under the *Corporations Act*, as well as how persons who are automatically disqualified from managing corporations will be identified. This is particularly important for small state-based incorporated associations who otherwise operate outside of ASIC's regulatory powers.

Similarly, it is unclear from the current wording of the standard as to what the interaction of ACNC's authority is in these matters with the authority of the various state regulators covering incorporated associations. Will one regulator have precedence over the other? Or will disqualification by either ACNC or any one state regulator be sufficient to disqualify a responsible entity? Will disqualification from managing a corporation by either ASIC, including automatic disqualification under the *Corporations Act*, or by any state regulator of incorporated associations result in listing of the responsible entity on the *Disqualified Responsible Entities Register*? Will disqualification by a regulator in one state result in a responsible entity being placed on the *Disqualified Responsible Entities Register* for charities in all states? Ready access to this information for small state-based incorporated associations would be of great benefit, particularly for those based on or near state borders.

CCSA believes that the involvement of the Commissioner in determining whom the charity can appoint as a responsible entity requires further clarification. If the charity decides to

appoint an otherwise disqualified person as a responsible entity the charity may seek an exemption from the Commissioner to so appoint the person. The principles to be applied by the Commissioner in determining their exercise of that discretion as well as the weight to be given to the charity's request, recognising its status as an independent body, presumably best aware of its particular needs, require clarification.

Further clarification is also sought on whether the Commissioner's discretion under subsection (5) of the standard to appoint an otherwise disqualified person is limited in time or otherwise. Similarly, can the Commissioner intervene to either disqualify a previously permitted responsible entity or to remove an otherwise complying individual who is failing in the performance of their duty to the charity itself?

As with previous draft governance standards, inclusion as notes of some of the explanatory material in the Consultation Paper would provide useful guidance.

3.6 Draft Governance Standard 6: Duties of Responsible Entities

12. Does 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? If so, what would these protections be?

The decision to replace sections of the *Corporations Act* with similar sections under the *ACNC Act*, as presented in these Governance Standards, in an attempt to make the governance requirements more flexible for charities appear to actually make the requirements weaker than was previously the case, particularly for those charities that were formerly regulated by ASIC. Similarly, very clearly stated requirements have been replaced with vaguer expression. This risks a reduction, rather than improvement, in the governance standards achieved by charities, especially the smaller, less well-resourced ones.

CCSA is concerned that the protections listed in the draft governance standard may increase the risk that individual responsible entities may choose to abrogate their responsibilities. In the case of charities managing public funds, whether those funds are obtained through government grants or by public donations, there is a case that if anything the standard of governance and accountability should be higher, not reduced. The standards to which responsible entities are held should be independent of the remuneration received by them. Further diminution of the level of responsibility accepted by responsible entities by providing even more additional protections to volunteer responsible entities is not supported.

Draft Governance Standard 6 requires the registered entity to take reasonable steps that its responsible entities comply, but is silent on what process is available to the registered entity when compliance does not occur. The disputes that arise from non-compliance of responsible entities with their duties can paralyse community managed services and threaten their viability in a very short time. CCSA has had many experiences where this has occurred without any process to resolve it other than either an individual or the 'registered entity' receiving independent legal advice (as suggested by the State Office of Fair Trading). This has generally not resolved the issue. An explanation of the role for ACNC in intervening to uphold the governance standard would therefore be useful.

4. Timing Issues

15. Are the transitional arrangements proposed adequate?

The timing provided for charities to implement the standards (18 months from 1 July 2013 and 4 years where governing rules have to be changed) is adequate.

5. Conclusion

The draft governance standards are mostly clearly expressed. However, they would generally benefit from more notes in the standards themselves, providing greater clarity and explanation so that smaller, less well-resourced charities are better able to understand and comply with their requirements. The explanations provided in the Consultation Paper are a good starting point for that additional information.

The greater concern is that, in their current form, the draft governance standards appear to represent a reduction in the standard of governance expected of a charity regulated by ACNC compared to that required of companies regulated by either ASIC or the state regulators of incorporated associations. In the case of the ECEC sector in NSW, this will see the anomalous situation of a not-for-profit ECEC service without charitable institution status being held to a higher degree of governance accountability than its ECEC charity neighbour, despite delivering the same community service and not receiving publicly funded benefits such as tax concessions available to the charity (at least until not for profits are also covered by ACNC). This would be a permanent relative difference for privately owned ECEC services.

The focus of the draft governance standards on providing flexibility appears directed towards larger charities which already operate with a high standard of governance commensurate with their size and resources. Small community-managed charities, typified by rural and remote ECEC services, generally benefit from clear guidance and direction in meeting their obligations. The minimalist approach described in the draft governance standards will not assist this and may have the unintended consequence of reducing the level of governance in the sector, rather than providing 'flexibility'.

If any further information is required please contact Ms Samantha Edmonds, CEO.