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**AMNESTY INTERNATIONAL AUSTRALIA'S SUBMISSION ON NOT-FOR-PROFIT GOVERNANCE
ARRANGEMENTS**

Thank you for the opportunity to provide our responses to the Treasury Consultation Paper – *Review of not-for-profit governance arrangements*.

Our comments to the questions set out in the Consultation Paper are considered in turn below. We would welcome the opportunity to discuss our responses with you further, if requested. For completeness, Amnesty International Australia (hereafter referred to as 'AIA') has not provided comments in response to questions 9, 14, [20,] 27, 32[, 31 and 33].

Preliminary comments

AIA notes with some concern that the definition of who is a 'responsible individual' is not open for comment in the Consultation Paper. The Consultation Paper suggests that the definition of 'responsible individual' to be included in the ACNC legislation will include:

- *"a director or officer of the registered entity;*
- *an individual:*
 - *who makes, or participates in making, decisions that affect the whole or a substantial part, of the registered entity's activities; or*
 - *who has the capacity to significantly affect the registered entity's financial standing;"* [paragraph 85].

While AIA appreciates the need to set duties and minimum standards for the proper management of NFPs, AIA believes the proposed definition expands the concept of a 'responsible individual' beyond what is necessary to achieve the objective of ensuring accountability in the administration of NFP entities. To include an **"officer of the registered entity"** and an **"individual who...participates in making**

decisions that affect the whole **or a substantial part** of the registered entity's activities" (emphasis added) within the definition potentially includes the majority of employees of an NFP within the definition of 'responsible individual' and hence would make the majority of AIA employees subject to the proposed duties and obligations associated with this position of 'responsible individual.'

As the Consultation Paper proposes that these 'responsible individuals' will be subject to duties akin to the duties imposed on directors at common law, AIA is seriously concerned that the broad scope of this definition will impose a significant burden on the organisation to ensure employees are not only properly trained, but also comply, with these new and onerous obligations. AIA therefore submits that the Government consider tightening the proposed definition of 'responsible individual' to only encompass individuals significantly high enough up in the organisational structure such as directors and chief executive officers etc.

Our responses to submission questions relating to the duties of 'responsible individuals' should therefore be read with this caveat in mind.

Question 1: Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?

AIA believes that while it is important for the legislation to clearly set out who 'responsible individuals' owe duties to, this must be determined solely by reference to the constitution or governing rules of the NFP, as NFPs must retain the discretion to choose who they 'contract' with.

AIA submits that it is unnecessary for legislation to stipulate who 'responsible individuals' must consider when exercising their duties, as this will also be determined by the constitution or governing rules of the NFP, and the best interests of donors, beneficiaries and the public will always form an inherent consideration in decision making.

Question 2: Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?

The Consultation Paper suggests that NFPs must be accountable to 'interested parties' such as volunteers, donors, beneficiaries and the public at large. While AIA understands the need to ensure that NFPs are operating in the best interests of those affected by their operations and not for the interests of management, AIA believes that expanding the body of persons that 'responsible individuals' need to consider when exercising their duties to 'interested parties' as proposed above goes too far.

The Consultation Paper suggests that 'responsible individuals' should owe duties to donors who gift money to an entity. AIA believes that NFPs must be accountable to their donors. However, it must be acknowledged that the NFP sector is sufficiently large and competitive to offer a 'free market' to donors. If an NFP entity does not use the donor's funds for the purpose for which the monies were given, donors can cease making any further donations. It is therefore in the best (and commercial) interests of any NFP entity to ensure donors are kept informed and satisfied with an NFP's performance. AIA thus feels it is unnecessary to place any statutory duty on 'responsible individuals' to

consider donors when exercising their duties, and a 'free market' approach should be considered to be sufficiently compelling.

AIA also submits that public funding of NFPs does not necessitate requiring 'responsible individuals' to consider the public at large when exercising their duties. There are a number of NFPs, including AIA, that do not accept funding from government, so it would be unwarranted to require the 'responsible individuals' of these NFPs to consider the public when exercising their duties based on this reason alone. Further, the concept of the 'public at large' is incredibly broad and it would ignore reality to assume that the public had a cohesive interest that 'responsible individuals' of an NFP could easily consider (especially given that many NFPs are established to pursue the interests of minority groups within the public). Imposing an obligation to consider the 'public at large' would also enlarge the body of 'interested parties' a 'responsible individual' must consider beyond what is practical to make effective decisions about an entity's direction.

AIA believes that, when exercising their duties, 'responsible individuals' should only be required to consider the mission and purpose of the entity and the people to whom they are contractually bound to consider under the constitution or governing rules of the NFP.

Question 3: What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?

AIA submits that 'responsible individuals' of NFPs entities should have the same duties as directors of for-profit entities under the Corporations Act and at common law. Even though the relationship between donors and 'responsible individuals' of an NFP is not the same as that existing between shareholder and director of a for-profit entity, AIA believes that applying directors' duties to 'responsible individuals' within the NFP sector would be the most effective means to ensure that accountability and high ethical standards continue to operate across the NFP sector.

AIA stresses, however, that it does not agree with the broad definition of 'responsible individual' outlined in the Consultation Paper, and firmly believes that duties applying to 'responsible individuals' should only apply to those individuals high up in the organisational structure of an NFP entity such as (in the case of AIA) members of the Board of Directors, National Director, Chief Executive Officer, etc.

Question 4: What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?

AIA submits that the minimum standard of care required of 'responsible individuals' when exercising their duties should be the same degree of care, diligence and skill that a prudent individual would exercise when managing the affairs of others.

AIA firmly believes that the standard of care should be higher for paid employees than volunteers at a NFP entity. This is because, in our experience, volunteers often attend sporadically, are often not aware of or properly trained in organisational procedures/structures (as they often do not need to be) and are generally not in such a position of responsibility as to be held out to represent the entity. To impose a standard of care on volunteers equivalent to that of paid employees would place a significant administrative burden on NFPs to properly train volunteers and ensure there is rigorous supervision of volunteers at all times.

Question 5: Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?

AIA believes that NFPs should retain the autonomy and flexibility in hiring and recruiting 'responsible individuals', (whether this term is taken to refer to board members or employees) and accordingly we do not believe that the ACNC should mandate the qualifications, experience or skills required for individuals to hold the position of 'responsible individual.' As there are currently no qualification or experience requirements for directors of companies in the for-profit sector other than mandating the minimum age and personal solvency of a director, AIA can see no valid reason for legislating minimum credentials for people holding similar positions in the NFP sector.

Question 6: Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?

Due to some ambiguity in this question, AIA is unclear whether the 'minimum standards' referred to in this question relate to minimum standards of skills, experience or qualifications required of 'responsible individuals,' or whether the term refers to the duties of 'responsible individuals' as proposed in the Consultation Paper. Nevertheless, we will address both alternatives in our response.

As AIA does not believe that the ACNC should have a role in regulating 'minimum standards' relating to the qualifications, experience or skills of any 'responsible individual' employed by an NFP entity, it also does not support such minimum standards applying only to a particular portion of 'responsible individuals' within a NFP entity.

As regards 'minimum standards' relating to the duties of responsible individuals, AIA believes that these 'minimum standards' should only apply to a portion of 'responsible individuals' of an NFP entity. However, as mentioned in opening comments of this submission AIA does not believe that the definition of 'responsible individual' is sufficiently narrow to avoid imposing unreasonable burdens on ordinary employees to comply with duties analogous to company directors. Accordingly, AIA believes it is more reasonable and practical to narrow the definition of 'responsible person' (and hence narrow the range of people subject to particular duties and obligations) than to stipulate that only some 'responsible individuals' must meet with minimum standards and not others. AIA believes that to do otherwise would make it administratively difficult for a charity to determine which 'responsible individuals' are subject to particular duties and which are not.

Question 7: Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?

AIA believes that there certainly will be issues arising from the standardisation of the duties of 'responsible individuals' across all entity structures registered with the ACNC. Consequently, the ACNC

must be careful to ensure that the right balance is struck between achieving accountability, transparency and good governance and at the same time ensuring the sector is not faced with escalating administrative costs. If the sector is overburdened with governance requirements, administrative costs inevitably rise and donor resources must be redirected from the purpose for which they were given to meet governance costs. This will ultimately be damaging to the sector with donors increasingly disillusioned that their donations are going towards the administration of the NFP rather than to achieving the NFP's core mission and purpose.

Question 8: Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?

AIA believes that the obligations of 'responsible individuals' articulated above adequately address the concerns set out in the Consultation Paper.

Question 9: Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?

AIA has no comment in relation to this question.

Question 10: Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?

While AIA would prefer the core duties to be based on the Corporations Act, we appreciate that it would be difficult for the core duties of all 'responsible individuals' in the NFP sector to be based on one particular model alone. We therefore submit that elements from each model should be incorporated as relevant and appropriate.

Question 11: What information should registered entities be required to disclose to ensure good governance procedures are in place?

AIA believes that the current disclosure obligations under the Corporations Act for NFPs operating as companies limited by guarantee would provide a suitable model for disclosure requirements across the NFP sector. AIA also urges the government to standardise the disclosure requirements regarding the fundraising activities of charities as part of its consideration of disclosure requirements for NFPs generally. Currently each State and Territory imposes different obligations on charities to disclose their fundraising income and expenditure, which is cumbersome both on the administration and resources of AIA. If these disclosure requirements were instead administered centrally through the ACNC and formed part of the information an NFP was required to provide to the Commission, duplication with State based obligations could be removed and NFPs could be saved from repetitive and costly disclosure procedures.

AIA does however express some caution regarding the information statement the Consultation Paper proposes that NFPs should provide to the ACNC as part of its disclosure procedures, particularly if this would require the disclosure of commercially sensitive information about the operation of an NFP. It

must be borne in mind that the NFP sector is a competitive marketplace and disclosure obligations requiring an NFP to provide information about how it conducts its core business and achieves its mission could potentially require the disclosure of information that would be beneficial to competitors of a particular NFP. Without knowing the content that would have to be included in such an information statement, AIA cannot fully comment on whether or not such a statement should form part of the information NFPs should be required to disclose.

Question 12: Should the remuneration (if any) of responsible individuals be required to be disclosed?

AIA notes again that the definition of 'responsible individual' is crucial to answering this question. Based on the definition of 'responsible individual' currently proposed in the Consultation Paper, if the ACNC required NFPs to disclose the remuneration of 'responsible individuals' this would involve AIA disclosing the remuneration of many of its employees. Consequently, as the definition currently stands, AIA does not support any requirement to disclose the remuneration of 'responsible individuals'. AIA again urges the government to reconsider the definition of 'responsible individual' to reduce the compliance burden should there be a requirement to disclose the remuneration of 'responsible individuals'.

Should the definition of 'responsible individual' be amended, AIA also believes that there is an equity issue between the for-profit and not-for-profit sector if there is an obligation on NFP entities to disclose remuneration of 'responsible individuals' but no corresponding obligation for non-listed companies to disclose the remuneration of their directors.

Question 13: Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?

AIA believes that the sample conflict of interest policy proposed in the Consultation Paper would impose appropriate duties on 'responsible individuals' to disclose material personal interests, and brings the NFP sector into line with the governance requirements of the for-profit sector.

Question 14: Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?

AIA has no comment in response to this question.

Question 15: Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?

AIA believes that the types of conflict of interest that should be disclosed by 'responsible individuals' should be based on the concept of 'material personal interest' contained in the Corporations Act.

However, AIA feels that it would be useful for the ACNC to provide some guidance to the sector by providing examples of the types of conflict of interest that 'responsible individuals' should disclose.

Question 16: Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?

AIA believes that 'responsible individuals' of NFPs should have the same risk management obligations as are required by the fiduciary obligations of company directors in the for-profit sector. AIA does not believe that NFPs should be required to implement any additional risk management requirements beyond those required by the Corporations Act and the fiduciary obligations of directors.

Question 17: Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?

Beyond the risk management obligations associated with the fiduciary duties of directors, AIA does not believe that any other risk management procedures should be mandated by the ACNC.

Question 18: Is it appropriate to mandate insurance requirements to cover NFP entities in the event of unforeseen circumstances?

AIA urges the government to consider the additional cost burden that would be placed on certain NFPs should insurance be mandated to cover NFPs in the event of unforeseen circumstances. AIA suggests that, if necessary, the ACNC consider such factors as the size of an entity, turnover, and risks presented by virtue of their activities when determining criteria relating to mandatory insurance obligations.

Question 19: Should responsible individuals generally be required to have indemnity insurance?

AIA believes that indemnity insurance for 'responsible individuals' of an NFP should be a matter for decision by the NFP and the 'responsible individual' concerned, based on an informed consideration of the relevant factors involved.

Question 20: What internal review procedures should be mandated?

AIA submits that the ACNC should have not role in mandating internal review procedures as these should be contained in an NFP's governing documents such as its constitution. Any mandated internal review could amount to duplication which would lead to an unnecessary increase in administrative costs.

Question 21: What are the core minimum requirements that registered entities should be required to include in their governing rules?

AIA submits that the core minimum requirements that should be included in the governing rules of NFPs should cover those currently contained in the “mandatory rules” of the Corporations Act.

Question 22: Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?

AIA submits that the ACNC should adopt a minimalist approach in mandating requirements of the governing rules. The required rules should extend no further than the current “mandatory rules” within the Corporations Act. AIA does not believe that the NFP sector is in need of greater regulation and the ability to mandate specific requirements for the governing rules of NFP’s ought to be beyond the scope of the ACNC’s power.

Question 23: Who should be able to enforce the rules?

AIA believes that the governing rules of an NFP entity should be enforceable in a court of law.

Question 24: Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?

AIA believes that if the ACNC is to take over the regulation of NFPs operating as companies limited by guarantee, it should possess the same powers as ASIC regarding winding-up and deregistration.

Question 25: Should model rules be used?

AIA supports the model within the Corporations Act, whereby rules are automatically adopted unless the constitution of the organisation provides alternative rules. The rules present in the organisation’s constitution ought to prevail when inconsistent with the model rules.

Question 26: What governance rules should be mandated relating to an entity’s relationship with its members?

AIA believes that an entity’s relationship with its members should be regulated by the constitution of the NFP entity and the current requirements of the Corporations Act. AIA does not believe that any further governance rules relating to membership should be mandated by the ACNC.

Question 27: Do any of the requirements for relationships with members need to apply to non-membership based entities?

AIA makes no submission on this question.

Question 28: Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?

AIA submits that minimum meeting requirements ought to be mandated for all membership based NFP entities.

Question 29: Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?

AIA believes that large NFP entities do not need specific governance arrangements or additional support, as the internal structures of large NFP's are better suited to achieve governance outcomes. AIA makes no submission on specific governance arrangements or additional support for small and medium sized NFPs.

Question 30: How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?

AIA submits that for the ACNC to be effective in reducing the red tape for NFPs, it must be the sole government regulator of the NFP sector for financial and governance requirements. The ACNC must amalgamate the various state and federal financial and governance requirements so that all of a NFP entity's obligations are regulated by the one institution.

Question 31: What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?

AIA makes no submission on this question.

Question 32: Are there any particular governance requirements which would be useful for Indigenous NFP entities?

AIA makes no submission on this question.

Question 33: Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?

AIA makes no submission on this question.

Yours sincerely

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