Australian Catholic -
Bishops Conference -

Response to -
The Treasury Consultation Paper -

"Review of Not-for-profit Governance Arrangements" -

January 2012 -

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EXECUTIVE SUMMARY -

This submission will make some preliminary and general comments but the Australian Catholic Bishops Conference (ACBC) would want an opportunity to make further comments after more detailed study, and during later stages of the consultation process. At this stage many of those involved in governance bodies within church entities have not had the opportunity to meet and consider the consultation paper.

Under the proposed reforms, red tape will increase, not decrease, for many entities connected to the Catholic Church in Australia and its agencies (the Church).

The Australian Government should engage in a more collaborative partnership with the not-for-profit (NFP) sector to achieve regulation that meets the objectives of both the government and the sector. The danger with imposed regulation is that it can be seen by target organisations as a list of requirements to fulfil and the objective of the regulation is lost.

Opportunity for Light-Handed Regulation

Donors, unlike shareholders in a public company, or depositors or investors with a financial institution neither receive nor expect a *private* financial return on their contributions to the church activities which include many and varied works by big and small, metropolitan and provincial and remote rural parishes and parish bodies. Therefore, the concept of risk may take on a completely different character for a donor than for an investor.

The mere fact that an entity is a tax concession charity does not means that it controls funds from the public. There is a difference between entities that raise funds by public fundraising activities and provide tax deductions, and those that obtain funds only from members or participants in the activity such as parishes and in the support provided by parishioners.

Parishioners identify with the community benefit and social capital, generated by their local parish and church activities. They are able to observe directly how their contribution is applied locally through their direct involvement in worship and other parish activities. This relationship provides adequate opportunity for accountability and transparency and requires different treatment to the duties to a donor generally.

The ACBC is of the view that this context allows the Government and the ACNC to take advantage of greater opportunities for light-handed regulatory oversight than so far envisaged.

Self Regulation

The ACBC suggests that the Government consider including provisions in the proposed Australian Charities and Not-for-profits Commission (ACNC) legislation to enable complex organisations, such as churches, with many small and diverse entities to "self-regulate" with

assurances given by the relevant internal church body responsible for governance in relation to the principles governing the operations of the ACNC.

It should not be assumed that the larger an organisation is the more regulation it needs. On the contrary, and this is the case with the large religious organisations, their size means they have the capacity for self-regulation in matters of governance. The legislation should allow for this.

The ACBC would encourage the Commonwealth Government to revisit what we believe to be a major oversight in the Regulatory Impact Statement, namely the impacts across the diversity of entities in the not-for-profit sector.

The objects of the ACNC may be better and more cost effectively achieved if the ACNC was able to deal with a nominated authority within these complex organisations rather than each part separately.

The ACBC proposes that religious organisations retain their existing governance structures. These are able to provide the innovation, flexibility and community accountability that is the strength of their contribution to the community.

Enabling the development of the governance capacity of the not-for-profit sector may yield greater social dividends than a structural reorganisation of existing governance arrangements.

The governance regime should aim to set and raise standards through education and not by mandating standards through risk of penalty.

Any standardising of duties must contain sufficient flexibility in their application to recognise the diversity of sectors, entities and responsibilities and roles within the sector and entity.

Harmonisation

The ACNC's governance regime should not proceed until there is harmony between the Commonwealth, States and any other source of duties for responsible individuals of NFPs. It adds to red tape and compliance costs.

If there is to be "one framework" then there has to be commitment by State and Territory Governments to co-operate with a process of harmonisation of legislation. It is difficult to predict with any certainty the final regulatory impact for not-for-profit entities without knowing the preference or otherwise of State and Territory Governments to the concept of national harmonisation and its implementation

The ACBC proposes that the process of reforming NFP regulation, including any proposal to standardise governance requirements, should be determined only after there is a stated commitment to the process by State and Territory Governments.

Minimum standards already operate and there are elaborate systems of accreditation. Any involvement by the ACNC in these areas will involve unnecessary duplication and additional administrative burden.

Constituent Rules

The content of constituent rules depends on the type of entity (eg company, trust, incorporated association, unincorporated association). It is impossible to prescribe common rules for all NFPs. The choice of type of entity is often critical to how the internal governance structures of complex entities operate. Many Church entities do not have separate rules, or rules that only deal with part of their activity, as they operate under the *Code of Canon Law*.

The ACNC should not require an entity seeking registration to present separate rules where it is already part of an organisation that has its own internal governance structure or if required by its form of incorporation.

Given that entities can operate quite well without reference to specific governing rules, and only adopt those rules that suit their own purposes, all the ACNC should be concerned with is that the entity is acting consistently with its purposes, that is activities are not illegal, and that its structure is such that it is truly not-for-profit and individuals are not able to access its assets.

It is likely that only at a very high level will it be possible to mandate rules that will have suitable application to the wide variety of entities affected. The ACBC would wish to comment further on the workability of compulsory governance rules when particular proposals are presented.

Regulatory compliance

Where existing regulatory compliance around governance, financial reporting and risk management already meet the proposed benchmarks under the proposed ACNC regulation, there should be no additional compliance burden imposed by the ACNC legislation.

State and Territory Governments have facilitated a process of incorporation of corporate trustees for most of the major religious organisations precisely because they have recognised that their size, diversity and complex structures require this type of legislative intervention to facilitate good governance and simplify legal interactions between such bodies and the community.

Any move to standardise governance for the not-for-profit sector should take this into account and preserve such arrangements. In fact there is a strong case that they could be mirrored in commonwealth law.

Disclosure of remuneration and money spent on core works as a ratio of overhead costs, etc is inappropriate.

It should be left to each entity to determine its appropriate risk management framework, through education by the ACNC.

Impact of new governance arrangements

The Consultation Paper does not provide any analysis of the possible impact of new governance arrangements on the NFP sector. The Consultation Paper does not appear to have considered key issues such as identifying a problem to be fixed arising from market failure, regulatory failure, unacceptable hazard or risk, or social goals or equity issues. Without a clearly defined problem and some indication of the impact of options advanced, there is the very real risk the chosen solution will fail to add any value to the not-for-profit sector and will not meet the Government's regulatory needs.

The Regulation Impact Analysis released in May 2011 did not take into account the diversity of entities in the NFP sector. Hence there is insufficient regard to the need for different regulatory treatment to reflect the variety of governance structures and practices.

There is little indication in the Consultation Paper of any reduction in red tape. On the contrary, entities that previously have not had any reporting or other governance burdens would now have to meet new and additional regulatory obligations.

Responsible Individual

To avoid the unnecessary and wasteful multiplication of notifications of changes, consideration should be given to allowing a person holding a nominated office to be deemed a "responsible individual" rather than by individual name. For example, a Catholic parish is governed by a parish priest who would be a responsible individual.

Many charities, and especially those conducted by the major religious organisations, are privileged to have the volunteer services of professionals who give of their time and expertise to assist those responsible for governing the entity. Legal liability could be a significant deterrent to their participation and a great loss to the charity. The legislation should explicitly exclude members of advisory bodies from the definition of responsible individual in the same way that it proposes to exclude professional advisers.

Universal Minimum Duties for Responsible Individuals

The ACBC supports a statement of universal minimum duties for responsible individuals. The concern with the approach in the Consultation Paper is that it will make it more difficult to attract quality persons to roles within NFPs because of the additional regulatory overlay. It must be remembered that most "responsible individuals" for NFPs are volunteers who face competing commitments for their time.

INTRODUCTION -

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

The role of the Catholic Church in Australia and its agencies (the Church) is well known, but as the structure of the Church is less well-known, the ACBC considers it may be helpful to those involved in the NFP reform process to have on record a brief description of the structure and modes of governance that operate.

Church Entity

Following the introduction of the Goods and Services Tax (GST), many parishes, schools and other church entities registered and were endorsed as charities with the Australian Tax Office (ATO) for eligible tax exemptions. There are currently 3,663 entities in the Catholic Church GST religious group. This does not reflect all the entities that comprise the Church as in some cases all the schools in a diocese were endorsed as one entity and in other cases entities were endorsed as branches. The Catholic Church comprises parishes, organisations within parishes, dioceses, religious orders, provinces, the church nationally and local entities that are part of the church internationally. The Catholic Church is heavily involved in public and private hospitals, aged care, welfare, education (primary, secondary and tertiary) and support of migrants and refugees.

In Australia, parishes of the Church are unincorporated and where church entities are incorporated, they tend to be registered locally in states and territories, rather than nationally. For most unincorporated church entities there is a trust corporation that acts on their behalf in matters relating to property, finance and investment. This has led to cost-efficient governance of these entities supported by fit-for-purpose financial reporting. Under the proposed reforms, these unincorporated parishes and entities, by virtue of their registration as “charities”, will now come under the regulatory ambit of the Australian Charities and Not-for-profits Commission (ACNC). Under the proposed reforms, red tape will increase, not decrease, for many entities connected to the Church.

Church Governance Structure

The structure of the Catholic Church allows the parish priest, supported by volunteer parishioners, to manage the finances of the parish. There is internal accountability and reporting to parishioners and reporting to the bishop as the next higher church authority. At

the level of the diocese the bishop has responsibility for governance, within the constraints of church law.[1] He is assisted by mandatory advisory bodies.

Within the Church, Canon Law provides the basis by which a parish priest has the authority, and thus takes the part of the responsible officer for making decisions related to the operation of the parish, the application of its financial resources and oversight of parish entities. Canon Law provides the context and boundaries for the role and responsibilities of the parish priest and parishioners.

Good governance is at the heart of canon law which stipulates not only the role of the parish priest but also the levels of co-operation and trust between clergy, parishes, dioceses and higher organisational levels of the Church. There is law relating to permission for acts of extraordinary administration (measured according to resources) and alienation of church property. At every level those charged with administration are required to consult with, and at times, obtain the approval of, a finance council.

The ACBC suggests that the Government consider seriously including provisions in the proposed ACNC legislation to enable complex organisations, such as churches, with many small and diverse entities to "self-regulate" with assurances given to the ACNC by the relevant internal church body responsible for governance in relation to the principles governing the operations. There are many precedents in the private sector where government has accepted the principle of industry self-regulation (e. g. print journalism, sporting codes, and professional bodies) and major religious organisations within Australia have the credibility and community respect to be treated similarly. The objects of the ACNC may be better and more cost effectively achieved if the ACNC was able to deal with a nominated authority within these complex organisations rather than each part separately.

Parishioners

Parishioners provide non tax-deductible contributions (e.g. deposited voluntarily to collections before, during and after church services) and tax deductible contributions (e.g. donations to endorsed school building funds). Donors, unlike shareholders in a public company, or depositors or investors with a financial institution neither receive nor expect a *private* financial return on their contributions to the church activities which include many and varied works by big and small, metropolitan and provincial and remote rural parishes and parish bodies. Therefore, the concept of risk may take on a completely different character for a donor than for an investor.

Parishioners identify with the community benefit and social capital, generated by their local parish and church activities. They are able to observe directly how their contribution is applied locally through their direct involvement in worship and other parish activities. This relationship provides adequate opportunity for accountability and transparency and requires different treatment to the duties to a donor generally. And again the status of donor is entirely different to say a shareholder in a public company, or a depositor in a financial institution who desires not only to know how revenues and profits are allocated, but also the prospect of a return on their financial investment.

[1] The *Code of Canon Law* is the universal internal law of the Church.

The ACBC is of the view that this context allows the Government and the ACNC to take advantage of greater opportunities for light-handed regulatory oversight than so far envisaged.

The ACBC proposes that religious organisations retain their existing governance structures. These are able to provide the innovation, flexibility and community accountability that is the strength of their contribution to the community.

Further Consultation

The ACBC notes that the Consultation Paper (CP) was issued on 8 December 2011 with replies due on 27 January 2012.

The ACBC is very willing to engage in the consultation process and is committed to assisting in the process for formulating good regulation for the not-for-profit (NFP) sector.

This submission discusses some strategic issues and provides comments on individual questions posed for consultation. However the ACBC would want an opportunity to make further comments after more detailed study, and during later stages of the consultation process. At this stage many of those involved in governance bodies within church entities have not had the opportunity to meet and consider the consultation paper.

This submission should also be read in conjunction with the submission the ACBC will make with respect to the Exposure Draft of the *Australian Charities and Not-for-profits Commission Bill* 2012 (ACNC Bill).

It is noted that the outcome of the consultation on governance may be reflected in additional provisions to the ACNC Bill. The ACBC would want an opportunity to comment on any proposed legislative provisions when they are formulated.

Two other Church Bodies, Catholic Health Australia (CHA) and Catholic Social Services Australia (CSSA) are making sector specific submissions highlighting particular issues that are relevant to their constituencies and the ACBC endorses their submissions.

STRATEGIC ISSUES

Before dealing with the detailed issues raised in the Consultation Paper the ACBC notes the following general principles and concerns:

- **Objective**: the governance regime must not discourage (in fact, it should encourage) participation from appropriately qualified persons in the community. The concern with the approach in the Consultation Paper is that it will make it more difficult to attract quality persons to roles within NFPs because of the additional regulatory overlay. It must be remembered that most "responsible individuals" for NFPs are volunteers who face competing commitments for their time. The governance regime must not be intimidating to persons who would otherwise give their talents and time.
- **Education and guidance**: a common theme of this submission is that the governance regime should aim to set and raise standards through education and not by mandating standards through risk of penalty.
- **Coverage**: the ACNC's governance regime should not proceed until there is harmony between the Commonwealth, States and any other source of duties for responsible individuals of NFPs. It adds to red tape and compliance costs if the ACNC governance regime operates at the same time as competing regimes at State level (e.g. State trustee legislation) or in other areas of Commonwealth law (e.g. regulatory standards for health and aged care providers, standards imposed under the tax laws, etc.).
- **Duties**: the ACBC supports a statement of universal minimum duties for responsible individuals. The key standards would address minimum content such as acting in good faith, with reasonable care and skill and not acting in conflict of interest.
- **Disclosure**: disclosure of remuneration and money spent on core works as a ratio of overhead costs, etc. is inappropriate. This is a matter which should be left to be regulated by stakeholders without intervention by the law. Whether an entity discloses these matters should be up to the entity and its judgment about the consequences.
- **Risk management**: it should be left to each entity to determine its appropriate risk management framework, through education by the ACNC.
- **Rules**: the content of constituent rules depends on the type of entity (e.g. company, trust, incorporated association, unincorporated association). It is impossible to prescribe common rules for all NFPs. The choice of type of entity is often critical to how the internal governance structures of complex entities operate. Many Church entities do not have separate rules, or rules that only deal with part of their activity, as they operate under the *Code of Canon Law*.

The ACBC notes the comment of the former Assistant Treasurer, the Hon Bill Shorten MP, in his Foreword to the Consultation Paper (CP p vii):

> By streamlining and centralising governance arrangements into one framework, and reducing red tape, NFPs will be able to spend less time complying with duplicative or burdensome arrangements, and more time helping the community.

This is a laudable objective which the ACBC fully supports.

In accordance with the Australian Government's National Compact with the NFP sector,[2] all the proposals for reform of the regulation of NFPs should aim to reduce administrative burden and promote clarity and certainty.

The Consultation Paper, however, does not provide any analysis of the possible impact of new governance arrangements on the NFP sector. The Consultation Paper does not appear to have considered key issues such as identifying a problem to be fixed arising from market failure, regulatory failure, unacceptable hazard or risk, or social goals or equity issues.[3] Similar criticisms could be made of the Regulation Impact Analysis released in May 2011, which did not take into account the diversity of entities in the NFP sector. Hence there is insufficient regard to the need for different regulatory treatment to reflect the variety of governance structures and practices. The lack of detailed analysis of the problems to be addressed by the operations of the proposed Commission leaves open the possibility of imposition of a regulatory burden far in excess of that currently envisaged.

The additional regulatory burden could fall heavily on Catholic parishes and other smaller church entities.

There is little indication in the Consultation Paper of any reduction in red tape. On the contrary, entities that previously have not had any reporting or other governance burdens would now have to meet new and additional regulatory obligations. If there are some cases where some additional regulation of governance is warranted, the case justifying this needs to be made clearly and evidence provided that there will be overall benefits to the NFP sector and the community from this additional regulation.

The ACBC, based on the diversity of entities within the Church, would encourage the Commonwealth Government to revisit its Regulation Impact Statement to identify and measure the extent to which the sector as a whole, and different groups of charities and other NFPs within the sector, will be affected.

Consideration should be given to enabling governance arrangements within complex religious organisations and related entities and associated reporting requirements to be modified in a way that reflects their particular needs, and excluded from direct regulatory oversight by the ACNC. The eligibility criteria as set out in the NSW *Charitable Fundraising Act* 1991 as discussed below in the response to Question 29 would be a good model for such an exclusion. An alternative would be to link the exclusion to participation in a GST Religious Group.

[2] Australian Government, National Compact: Working Together, 2011. http://www.nationalcompact.gov.au/compact
[3] Australian Government 2010, *Best Practice Regulation Handbook*, Canberra. Page 28.

While it is understood that the Treasury engaged in targeted consultation in the preparation of its Regulation Impact Statement, the subsequent release of discussion papers and exposure drafts has raised more issues to address, notably the diversity of the NFP sector including religious institutions. Without a clearly defined problem and some indication of the impact of options advanced, there is the very real risk the chosen solution will fail to add any value to the not-for-profit sector and will not meet the Government's regulatory needs.

The Australian Government should engage in a more collaborative partnership with the NFP sector to achieve regulation that meets the objectives of both the government and the sector. The danger with imposed regulation is that it can be seen by target organisations as a list of requirements to fulfil and the objective of the regulation is lost. Better engagement with the sector will see compliance with the spirit as well as the letter of the law.

Harmonisation

If there is to be "one framework" then there has to be commitment by State and Territory Governments to co-operate with a process of harmonisation of legislation. It is difficult to predict with any certainty the final regulatory impact for not-for-profit entities without knowing the preference or otherwise of State and Territory Governments to the concept of national harmonisation and its implementation by either adoption of model legislation or referral of powers. We note that in other areas of government where national harmonisation has been canvassed, e g occupational health and safety, these processes of negotiation can take some years.

In its submission on the Scoping Study for a National Not-for-profit Regulator the ACBC noted:

> The ACBC agrees with the SSCP [Scoping Study Consultation Paper] (paragraph 31) that the regulatory framework involves significant overlap and duplication between the various levels of government. Co-ordination across a multiplicity of portfolios and levels of government is an admirable objective. The ACBC suggests that the Commonwealth government might consider establishing a COAG working party or Ministerial Council to oversee the process of bringing about harmonisation within the regulatory framework of the NFP sector by targeting the main areas of unnecessary duplication.

The Consultation Paper states (CP p 3), that the Commonwealth "hopes to work with the states and territories to ensure that the ACNC will be a national regulator." The ACBC proposes that the process of reforming NFP regulation, including any proposal to standardise governance requirements, should be determined only after there is a stated commitment to the process by State and Territory Governments. If the Commonwealth's "hopes" are not realised the sector will be faced with significant duplication of regulation and at considerable additional cost.

In the Introduction to the Consultation Paper (CP p viii) there is a reference to governance obligations that are appropriate to not-for-profits *regardless of entity type* (emphasis added*)*. This point is then specifically stated in CP paragraph 37.1. There seems to be an

underlying assumption that certain governance principles can apply to all NFPs and that the type of entity is not relevant. The ACBC, based on the diversity of entities within the Church, challenges that assumption.

Entity Type

It is not yet clear whether the focus of any new national regulation is on the legal form of the entity or the activities it undertakes, or a mixture of both. This is an initial threshold issue which needs to be resolved. Does a charity that is a company limited by guarantee require regulation relating to its governance because it is a charity or because it is a company? Which dimension poses a risk, or otherwise requires regulation? Are governance requirements necessary to protect the members and control the actions of the directors, or are they in place to influence the way the entity deals with the public, or fulfils its purposes effectively?

The entity type or vehicle used to advance the purpose is significant. A limited liability entity is fundamentally different to an entity that is an unincorporated part of a larger organisation. Governance requirements will necessarily be different because of the structure adopted.

The ACBC notes the proposal (CP para 4 p 1)

> The intent of the governance review is to centralise and simplify the existing arrangements in order to reduce red tape and minimise compliance burdens for the sector.

The Consultation Paper (para 11 p 1) notes that the *Final Report on the Scoping Study for a National Not-for-profit Regulator* (Final Report) concluded that, "the diversity of the sector should drive consideration of suitable governance arrangements". This is consistent with the National Compact priority action item 3: "*Recognise sector diversity in consultation processes and sector development initiatives".*

Contrary to that policy statement, the Consultation Paper then refers to "standardisation" and "uniform governance requirements" (CP para 21 p 3). The Consultation Paper proposes that "any core governance rules developed would be compulsory for entities seeking registration by the ACNC" (CP para 81 p 15) and proposes that the rules "apply to all registered entities" (para 80 p 15). It is likely that only at a very high level will it be possible to mandate rules that will have suitable application to the wide variety of entities affected. The ACBC would wish to comment further on the workability of compulsory governance rules when particular proposals are presented.

The Consultation Paper does not make any reference to the particular governance structures of the major religious organisations. These organisations are highly complex, reflecting their size and their significant contribution to almost all areas of social life. As noted above, there are currently 3,663 entities in the Catholic Church GST Religious Group approved under section 49-5 of the *A New Tax System (Goods and Services Tax) Act 1999*. These range in size from major public teaching hospitals to local community based groups. Most are already

highly regulated by government instrumentalities responsible for health, aged care, education, and social welfare. They already have in place governance structures appropriate to the type of entity, their size and risk that meets the needs of these regulatory bodies.

Their governance arrangements and practices vary significantly due to the particular needs of each sector, their size, and historical factors. Where existing regulatory compliance around governance, financial reporting and risk management already meet the proposed benchmarks under the proposed ACNC regulation, there should be no additional compliance burden imposed by the ACNC legislation.

Many of the entities that are part of the Church (and other religious organisations as well) are entities that are "bodies of persons" with governance by an individual, such as a bishop, parish priest, or agency director. It is the practice of many unincorporated church bodies for the head of the relevant body (for instance, the parish priest or agency head) to enter into contracts on behalf of the unincorporated church body. Where it is necessary, or convenient, however, for a corporate entity to enter into contracts, trust corporations established by State or Territory law can enter into contracts on behalf of unincorporated church bodies. There is a passing reference to such structures in the Consultation Paper (para 78 p 13) which describes them as historical arrangements and "often not applicable to newly forming entities". This is not accurate. The *Roman Catholic Church (Incorporation of Church Entities) Act* 1994 (Qld) provides a contemporary mechanism for incorporating church entities.[4] The *Roman Catholic Church Communities Land Act* 1942 (NSW) allows for new entities to establish statutory trust corporations. The most recent was for The Trustees of the Discalced Carmelite Nuns, Varroville in 2010.

State and Territory Governments have facilitated this process of incorporation of corporate trustees for most of the major religious organisations precisely because they have recognised that their size, diversity and complex structures require this type of legislative intervention to facilitate good governance and simplify legal interactions between such bodies and the community.

The use of trust corporations to provide any necessary legal personality on behalf of entities that are unincorporated or are "other bodies of persons" enables religious organisations to efficiently carry out activities without the need for additional bureaucracy and duplicative internal compliance or governance structures. This enables a flexible approach to meeting needs that arise. The overall governance structure of the church provides the necessary framework for such entities' activities.

Any move to standardise governance for the not-for-profit sector should take this into account and preserve such arrangements. In fact there is a strong case that they could be mirrored in commonwealth law.

The ACBC notes the recommendation of the Final Report, cited in the Consultation Paper (CP para 13.5 p 2) that "government contracts should no longer mandate organisational governance requirements for NFPs." The ACBC support such a recommendation. There have

[4] Cf Brian Lucas, Peter Slack, William d'Apice *Church Administration Handbook*, St Paul Publication, Homebush, 2008 p 259ff.

been instances where government instrumentalities have insisted that the counter-party to a contract be an incorporated entity and have refused to recognise the capacity of statutory trust corporations to act on behalf of non-incorporated entities.

The ACBC agrees with the general proposition that organisational governance rules should be proportional to the size of entities, risk factors and receipt of public and government assistance. A distinction must be made, however, between rules that involve a governance structure and those that involve governance practice. For example honesty is required whether the entity is large or small, receives public funds or only private donations, and irrespective of the sector in which it operates.

It should not be assumed that the larger an organisation is the more regulation it needs. On the contrary, and this is the case with the large religious organisations, their size means they have the capacity for self-regulation in matters of governance. The legislation should allow for this.

The ACBC proposes that the core governance requirement is as set out in the Consultation Paper (CP para 87) and little more than the second sentence is required in legislation:

> NFP entities have responsibilities to donors, beneficiaries, volunteers, government, members (where applicable) and the public at large, and responsible individuals must act with care and diligence, in good faith, and not misuse their position. Responsible individuals must exercise at least the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others.

Practical advice in how to do this can be part of the ACNC educative role and in this respect the ACBC notes with approval the advice of the Charities Commission of England and Wales in *Good governance: a Code for the Voluntary and Community Sector.*[5]

[5] Referred to in the Consultation Paper p 33.

CONSULTATION QUESTIONS

Responsible Individuals' Duties

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

This would be an overly prescriptive and simplistic approach to a matter that involves diversity of structures, operations, objectives and interests. It would risk trying to prescribe a "one size fits all" approach when the reality is otherwise. For example, in the case of the Church and other religious organisations, regard to spiritual matters is a self-evident and inherent part of decision making, but it is also one that legislation could not articulate in any meaningful way. The ACBC cautions against legislation attempting to enter into such matters.

While it might be accurate to consider directors of companies as responsible individuals, to extend the definition to an individual "who participates in making decisions" will create problems for those entities that rely heavily on advisory bodies. It could be argued that the members of an advisory body will be responsible individuals since they "participate in making a decision". This is an addition to the first part of the definition which is a reference to the one who "makes a decision" (CP para 85 p 16). Even though the actual decision is reserved to another individual or group, those who give advice will be included. A definition that is this wide is unworkable for the Church and most other religious organisations.

For example, in a Catholic parish the obvious responsible individual will be the parish priest. Church law requires him to have a finance council that typically comprises volunteer parishioners who assist him in making decisions. Yet the membership will change from time to time and some may be absent from some meetings. How will it be determined who will be responsible individuals in that context?

Some religious organisations have forms of governance by way of a Synod or Assembly that may have several hundred members. Are they all to be regarded as responsible individuals?

To avoid the unnecessary and wasteful multiplication of notifications of changes, consideration should be given to allowing a person holding a nominated office to be deemed a "responsible individual" rather than by individual name. For example, a Catholic parish is governed by a parish priest who would be a responsible individual. Perhaps through illness or other circumstances a number of short term temporary appointments to that parish might be made before a permanent appointment. It would be unworkable each week perhaps to notify a new "responsible individual". The nomination of that office should be sufficient.

Many charities, and especially those conducted by the major religious organisations, are privileged to have the volunteer services of professionals who give of their time and expertise to assist those responsible for governing the entity. If these volunteers

are to be regarded as responsible individuals and thereby incur some form of potential legal liability this could be a significant deterrent to their participation and a great loss to the charity.

The legislation should explicitly exclude members of advisory bodies from the definition of responsible individual in the same way that it proposes to exclude professional advisers.

Large organisations should have the option of nominating (and then being bound by) a person or office as the responsible individual.

The parties, to whom responsible individuals owe duties, and the particular duties they owe, will vary significantly depending on the nature of the entity, its structure, its activities and its relationship with government. It is not possible to itemise each of these various duties and those to whom they may be owed. This should depend on the general law of trusts, employment, tort and contract.

The general law sets out various duties that individuals owe to others in various circumstances. There is no need to go beyond that in legislation.

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?

At its most basic, the duty is to advance the mission and purpose of the entity, in accordance with the law. To attempt to define the duties any further is likely to be a futile exercise with an increase in compliance burdens.

The Consultation Paper (CP para 87 p 16) suggests that "NFP entities have responsibilities to donors, beneficiaries, volunteers, government, members (where applicable) and the public at large." The ACBC accepts this general proposition but its breadth deprives it of practical meaning. What will be important is the precise articulation in the legislation of what those responsibilities are. Most importantly these duties will be determined by the type of relationship that exists between the entity and the other named stakeholders.

Obviously there is a duty to a donor to use the donation for its proper purpose. To do otherwise is to misappropriate the funds and risk criminal liability. But it is less clear what might be meant by a general "duty to the public". Who is the public? What does one do if the public or sections of it have different expectations of how a particular NFP should act in a particular situation?

Other questions arise. How does one evaluate whether the duty to beneficiaries is met? Is it sufficient that the donations were spent as intended, or is there to be some measure of how effective that spending was? What is the standard of efficiency that is required to meet such a duty?

Furthermore, a distinction needs to be made between duties to the public at large, where there is a general invitation to make donations to a Deductible Gift Recipient, and the duties owed in other contexts, for example, by a parish to its parishioners who contribute without benefit of tax deduction because of their pre-existing relationship to the parish.

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

There is a general proposition (CP para 87 p 16) that "responsible individuals must act with care and diligence, in good faith, and not misuse their position." As well, "responsible individuals must exercise at least the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others."

The ACBC accepts this general proposition but what will be important is the precise articulation in the legislation of what the various terms mean. What does care and diligence mean? Is the test to be objective or subjective? Will it be a defence that a person genuinely thought he or she was being diligent but by reason of innocent error of judgement failed to meet some objective standard of diligence?

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?

The standard of care that one owes to others is covered by the general law of trusts, employment, tort and contract. The circumstances of NFPs vary so greatly as to make codification of universal minimum standards elusive. Further, it risks making life more complicated for responsible individuals who are already subject to rigorous and developed duties and standards under existing laws such as officers' duties for incorporated associations, the law of directors' duties in company law, fiduciary duties of trustees in trust law and duties owing by employees to their employer under employment laws (to identify a selection of the more obvious examples). The circumstances vary too greatly for any possible codification in the NFP regulatory regime of the standard applicable to all these various duties.

Any minimum standard of care would need to reflect that there are different types of entities of varying size and sophistication. The standard required of a responsible individual of a NFP operating as a company limited by guarantee with Deductible Gift Recipient endorsement and substantial donation income would be different to the standard required of a responsible individual of a local community organisation operating as an unincorporated association. The imposition of a standard of care expected of a public company director, which might apply in the first case, will be manifestly excessive for a parish priest or valued committee member of the local community organisation in the second case. The ACBC is concerned that there is a real risk that this type of regulation would deter persons who might otherwise be appropriately qualified to serve the local community organisation.

The ACBC submits that the existing law provides an appropriate framework and mechanisms for setting standards and enforcing compliance. Unless it is proposed to displace wholly the duties and standards under existing laws and replace them with a single code for responsible individuals of NFPs, then attempting to prescribe minimum duties and standards seems to impose another layer of regulation which risks duplication, added complexity, likely inconsistency and uncertainty. As already mentioned, this would only serve to act as a disincentive for appropriately qualified persons to make contributions to NFPs.

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)?

The ACNC may have a role in advising on appropriate qualifications and skills for responsible individuals, but should *not have a role in mandating* such skills and experience.

The ACBC suggests that what matters for good governance is the right blend of qualifications, experience, competence, honesty and commitment in each situation. The circumstances, activities, purposes, organisational structure, geographical location, and pool of possible responsible individuals vary too greatly for there to be any useful legislative requirement relating to these matters. There should be no academic requirement.

There are enough checks and balances implicit in the principles approach foreshadowed for the ACNC. Mandating specific minimum standards or qualifications would not respect the diversity of the sector and particular circumstances pertaining to various entities.

The focus of the ACNC might be better directed to improving the governance capacity of the not-for-profit sector and the skills of those involved. Enabling the development of the governance capacity of the not-for-profit sector may yield greater social dividends than a structural reorganisation of existing governance arrangements.

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

If there is to be any requirement imposed it should be that a majority of responsible individuals on the board, or in the case of trusts a majority of trustees, of the charity have a degree of responsibility to the community as a whole.

It should be noted that some entities may only have and require one responsible individual. If there is a sole decision maker for the charity or NFP as is the case in many religious organisations' entities, that person or office holder should qualify as a "responsible individual" by reason of nomination to that role by a higher authority within the organisation.

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

Any standardising of the duties must contain sufficient flexibility in their application to recognise the diversity of sectors, entities and responsibilities and roles within the sector and entity.

Some sectors, for example, health, aged care and education, are already heavily regulated and it is not suggested that such regulation which is directed to patient and resident safety and care should be reduced. In the area of education there are specific requirements with respect to issues of child protection. It would not be appropriate in many instances for duties relevant to one sector to carry over to another.

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?

Again these are matters already adequately covered by the general law. For example a volunteer has a duty not to act negligently so as to injure another person. Criminal law relating to offences of dishonesty applies to volunteers and employees alike. Work, health and safety legislation and regulations require various procedures to be established, documented in minute detail and enforced. All of these requirements of the law apply whatever the nature of the entity. There is nothing specifically relevant to NFPs.

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

The standard of care, under the general law, will depend on the precise circumstances, and the sector is too diverse to be able to codify what may be required. For those NFPs that are trustees there are already fiduciary duties in place. Areas of activity that are considered to be more high risk, such as health and aged care, child care and schools, are already regulated by the relevant government authorities in minute detail.

Leaving the difficulty of securing State and Territory agreement for the proposed national regulator to oversee governance of entities established under State or Territory law to one side, there exist a range of Commonwealth Government requirements for the practice of good governance (meaning structures to ensure public accountability) within not-for-profit bodies delivering Commonwealth funded programs. Several different Commonwealth Government Departments outline requirements for governance practice where a not-for-profit entity delivers a Commonwealth funded program. Similarly, different Commonwealth Government Departments have in place monitoring and investigation processes to ensure compliance with these expectations. These governance standards and the monitoring and investigation powers Government Department's have in overseeing these standards often operate in relation to not-for-profit as well as to for-profit entities.

Illustrations of the types of Church agencies that are subject to specific Commonwealth governance requirements include:

- Residential Aged Care Services, who must comply with the Aged Care Accommodation Bond Governance Standard as required by Section 23.38A of the *User Rights Principles 1997* as authorised by the *Aged Care Act 1997* and overseen by the Office of Aged Care Quality and Compliance. The standard requires a particular approach to investment of resident's bonds that are paid to enable capital investment for aged care infrastructure.
- Disability Service providers, who must comply with the twelve Disability Service Standards that are issued by the Department of Families, Housing, Community Services and Indigenous Affairs. The Department oversees the accreditation of funded agencies by assessing the effectiveness of governance structures in ensuring compliance with these twelve standards.
- Non-government schools governance arrangements for Catholic schools are already significant and comprehensive at both State and Federal level. At both levels, governance arrangements are in place to guarantee the proper use of recurrent and capital funding provided. In addition, State and Territory Governments have regulatory arrangements in place for the definition, registration and overall operation of Catholic and other non-government schools. There would be nothing to gain by the Australian Government imposing a further layer of governance accountability arrangements, or imposing generic NFP governance-cum-accountability.
- Social welfare and community care agencies are subject to detailed and complex Commonwealth and State legislation and regulation including detailed prescriptive standards.

Minimum standards already operate and there are elaborate systems of accreditation. Any involvement by the ACNC in these areas will involve unnecessary duplication and additional administrative burden.

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?

The ACBC is of the view that little is to be gained by attempting to replicate the general law of duties and good behaviour as a broad statement of principle is more likely to be exhortatory than enforceable.

The Consultation Paper (para 103 p 18) refers to the England and Wales Charity Commission which has established voluntary high-level, principles-based governance requirements including that an effective board will provide good governance and leadership by exercising effective control, behaving with integrity and being open and accountable. While not all governance is by a board it is fair to require that all those who govern will govern well and exercise effective control

As already mentioned, the principles in paragraph 87 of the Consultation Paper are sufficient.

Disclosure Requirements and Managing Conflicts Of Interest

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

This will vary significantly depending on the nature and scale of the entity, the activities it undertakes, and other requirements of the law. It is not clear in this question what is to be disclosed and to whom the disclosure is to be made. If it is meant to refer to governance policies then they can easily be made available to the regulator. It would be helpful if the regulator published some model policies relating to different aspects of governance that may aid entities in formulating their own internal governance processes. All that should be required in the law is that those responsible for governing entities have in place suitable policies to deal with the main areas of governance and risk.

The proposed disclosure through an information statement as outlined in the Consultation Paper (para 111 p 20) requires further consideration.

Within religious organisations there are potential conflicts of interest since those who govern are themselves the object of the governance. Many religious organisations operate consistent with mutual principles. For example a clergy remuneration fund will be governed by clergy. The advisory group in a parish will comprise parishioners who, in that capacity, may themselves be in a position to benefit with all other parishioners. Typically, religious organisations have checks, balances and the ethos to ensure these potential conflicts of interest do not materialise or are effectively managed. Government regulation is unnecessary and likely to be unable to envisage all likely situations that arise.

The question of preparation of financial reports, and in what form, and to whom they might be disclosed, is complex and could add significantly to the administrative burden on NFPs.

The ACBC will deal with this issue in more detail in its submission on the ACNC Bill.

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

The ACBC recognises that community expectations have risen in recent times on the disclosure of remuneration of directors and executives of major private and public companies and superannuation funds. It is understandable that large charities and NFPs handling considerable levels of financial resources, including those that are Deductible Gift Recipients, should also be subject to appropriate levels of disclosure of executive remuneration.The ACBC maintains that disclosure should be a matter left to self-determination and assessment of the consequences of disclosure or non disclosure by each individual entity.

If some disclosure is considered necessary, consideration should be given to confining disclosure to the ACNC to avoid the high risk that public information could be misused to the detriment of a particular entity. Unlike large commercial entities, where there is community curiosity but less adverse consequence, an individual charity could suffer irreparable reputational damage by any ill-informed media comment about its executive remuneration.

The ACBC would support adoption of standards of disclosure commensurate with ASIC rulings and accounting standards adopted for private sector entities. However, there should be no unwarranted intrusion on the privacy of employees. While it is reasonable to expect that the remuneration arrangements of staff be known to those responsible for governance, disclosure to the ACNC need only relate to revelations of the number of executives within bands of remuneration.

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

The ACBC supports the adoption of a "conflicts of interest" policy as outlined in the Consultation Paper (CP para 126 p 22). These policies need to be qualified by the reality that often associates of responsible individuals may provide services, especially in isolated areas or in specialised areas of expertise where there may not be a true "market" for such services.

Provided that such services are provided on normal commercial terms, and the relationship is disclosed to those responsible for the decision, and the other elements of a conflict of interest policy are applied, then there should not be any general prohibition.

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)?

The comment and qualification above in answer to question 13 can apply in this situation.

The Consultation Paper (paragraph 126: dot point 1) suggests that a "conflict of interest" policy might include that "a responsible individual should avoid any conflict arising between their personal interests (or the interests of any other related person or body) and their duties to the entity;" It goes on to propose (dot point 2): "a responsible individual must not take advantage of their position to gain, directly or indirectly, a personal benefit, or any benefit for any associated entity (their wife, say or a commercial entity)."

While these are reasonable if the benefits in question are commercial in nature, their inclusion may well discourage those who have a particular interest in the activities of a NFP. For example, those with interest in a particular disease type, or disability, may be deterred from contributing their services on the board of a Research Institute or a Foundation that raises funds for medical research, or supports people with that

disability. They could consider that any activity they undertake to support such research, or such entities, could be seen as contributing to personal gain (if they, or a close relative, have the disease, or disability in question). The legislation should explicitly exclude these instances from involving a conflict of interest.

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'?

The Corporations Act understanding is adequate.

Risk Management

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

The ACBC recognises that appropriate risk management strategies and practices represent an integral component of any well-run charity and NFP. However, not all NFPs control funds from the public. The mere fact that an entity is a tax concession charity does not means that it controls funds from the public. As mentioned above, there is a difference between entities that raise funds by public fundraising activities, and those that obtain funds only from members or participants in the activity such as parishes and in the support provided by parishioners.

The risk management requirements will depend on such factors as size, the type of activity and resources utilised and not whether the entity is a NFP, or a commercial or government entity.

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

The investment strategy should be related to the needs of the entity. Entities which have an investment pool for long term needs may have more appetite for short term risk than entities that are essentially involved in day to day funding with less reserved funds. It would be unwise to mandate any particular strategy. Developing an investment strategy is very entity specific and requires a careful assessment of short, medium and long term needs, regularity of income, assessment of likely future income and this is then relative to future needs. All that the ACNC should require is the general law that presently applies to trustees, namely, that those responsible for investments act prudently.

The ACBC supports the position set out in the Consultation Paper (CP paras 134, 135, p 24) that trustees prepare an investment strategy in relation to the entity's assets. The regulator could mandate the equivalent of section 14 of the New South Wales *Trustee Act 1925* which provides that the trustee can invest funds in any form of investment, or vary the investment at any point in time, under certain conditions. The general test is whether the person investing would act this way with respect to his or her own funds.

18. - Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?

The ACBC would support insurance relating to public liability, and general property insurance with a test of prudence relating to the risk and cost of the insurance. Where it is appropriate there should be a voluntary worker's policy. Some insurance such as that required for worker's compensation and motor vehicles is already mandated by other legislation. It may be useful for the ACNC, as part of its educative function, to issue some general guidelines on suitable levels of insurance for the most likely risks.

19. - Should responsible individuals generally be required to have indemnity insurance?

The ACBC supports this provided there is a test of prudence relating to cost effectiveness.

A better overall law reform would be to remove personal liability from responsible individuals who act in good faith in the course of their governance of the entity.

Internal and External Reviews

20. - What internal review procedures should be mandated

It is impossible to identify *all* the different internal processes that would apply to the myriad entities involved in the NFP sector and the Church in particular. There are 3,663 entities in the Catholic Church GST Religious Group. It is not possible within the Catholic Church to comprehensively mandate uniform internal review procedures due to the diversity of structures and activities.

The ACBC will comment on the question of accounting standards and audit requirements in its submission on the ACNC Bill.

Minimum Requirements for an Entity's Governing Rules

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

Not all entities have governing rules as suggested in the Consultation Paper (CP para 152 p 26) in the sense of a "a constitution, association rules, cooperative rules, memorandum and articles of association, or a trust deed."

For example, dioceses, parishes and other juridical bodies in the Catholic Church operate according to the Church's own internal law, *The Code of Canon Law*. This is a detailed prescription of internal law and operates internationally. Some church bodies will have a mandate, charter or statutes but the content may be limited to matters not otherwise covered in the general law of the Church.

The ACNC should not require an entity seeking registration to present separate rules where it is already part of an organisation that has its own internal governance structure or where it is not required by its form of incorporation.

Those entities that have governing rules should be allowed the freedom to establish rules that suit their own purposes and little is to be gained by trying to identify so called "core rules".

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?

This exercise is unlikely to protect the mission of the entity and interests of the public. Given that entities can operate quite well without reference to specific governing rules, and only adopt those rules that suit their own purposes, all the ACNC should be concerned with is that the entity is acting consistently with its purposes, that is activities are not illegal, and that its structure is such that it is truly not-for-profit and individuals are not able to access its assets.

23. - Who should be able to enforce the rules?

The rules themselves, for those organisations that have them, may specify who may have recourse, to whom there may be recourse, and for what reason. The regulator may have a role to ensure that if there is a breach of the rules those responsible can be called to account on the complaint of an interested party.

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

No. The powers of the ACNC should be limited to ensuring that the NFP entity fulfils its purpose.

25. - Should model rules be used?

Model rules should be available for those entities that wish to have that type of structure but they should not be mandated. The Consultation Paper, in this area, and in others seems to pre-suppose that the only governance structure of a charity is a form of association. As explained in the preliminary comments above, this does not apply to many religious organisations where governance is more often by an individual.

An entity is a defined term in the income tax, Australian business number (ABN) and goods and services tax (GST) legislation and means any of the following:

- an individual
- a body corporate
- a corporation sole
- a body politic
- a partnership

- any other unincorporated association or body of persons (excludes non-entity joint ventures)
- a trust
- a superannuation fund

The inclusion of a "body of persons" in this definition has allowed great flexibility for the various subsidiary entities of complex religious organisation to operate in their own name while utilising the statutory trust corporation for legal purposes. The governance provisions which the ACNC is considering should continue to allow the current arrangements which have not been the cause of any significant negative experience.

By way of example in the Catholic Archdiocese of Sydney there are approximately 30 diocesan agencies or entities that are not separately incorporated. This means that there does not need to be 30 boards of directors and associated infrastructure. There can be an overall governance structure and various delegations at an operational level. Yet each body can have its own identity, separate purpose, and, accordingly, a different accountability depending on whether it meets the criteria for a public benevolent institution, a deductible gift recipient or is simply a tax concession charity.

Relationships with Members

26. - What governance rules should be mandated relating to an entity's relationship with its members?

With the diversity of entities across the NFP sector, it is impossible to be prescriptive about governance rules to apply to all entities across all parts of the NFP sector.

As the Consultation Paper notes (CP para 161 p 28) not all entities have members. In some cases the membership relationship may be somewhat artificial. The sole member of one entity may simply be another entity within the overall organisation. For example, an entity may establish a new entity as a company limited by guarantee which it owns and controls, to undertake a particular purpose. Tax Ruling 2005/22 and its addendum deal with and provide examples of such entities.

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

No. Relationships with members are determined by the nature of the organisation and its internal structure.

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

The appropriateness of meetings will depend on the nature of the entity and the membership. Where the membership is really in the nature of one entity being the member of its subsidiary entities this is artificial and meetings are unnecessary.

Disputes within not-for-profit bodies are not unknown and often turn on personality conflicts or divergent views about how the entity should operate. Sometimes this involves disputes about meeting procedures, elections or other decision making processes. At times these have led to expensive litigation. It is unconscionable that the assets of an entity can be depleted on legal costs defending what can be the vexatious motives of a section of disgruntled membership.

At the same time legitimate concerns about proper governance need to be dealt with and preferably outside the litigious arena. There may be a concern that those governing a membership based organisation are not respecting the members' wishes, or that the relationship with members has deteriorated. A compulsory meeting may provide an opportunity for this in some cases but may only exacerbate problems in others.

The ACNC may be given power to demand that there be a general meeting of members conducted under its supervision to redress complaints from a significant proportion of members who so petition for such relief. It should have a power to investigate any "stacking of membership" or other unconscionable conduct that tries to manipulate elections or other governance formalities.

It would be helpful for the ACNC to establish something analogous to an ombudsman to investigate complaints in this area and facilitate a speedy and inexpensive dispute resolution process. An ombudsman type of role, built into the ACNC structure could operate to facilitate mediation between factions of members, if this is the cause of an organisation's dysfunction. An allocation of some resources to this purpose within the ACNC that otherwise would go to investigation and prosecution would be a useful contribution to better governance within the NFP sector.

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

There is a strong case that the large and complex religious organisations should be dealt with in a sector specific way. When the new tax system was introduced the government made a concerted effort to find solutions to issues that were unique to that sector. One example is the GST Religious Group established to minimise compliance requirements in relation to transactions between entities within the Group. Likewise, it is with good reason that such organisations were excluded from the provisions of the New South Wales *Charitable Fundraising Act* 1991.[6]

[6] **7 Religious organisations exempt from Act**
(1) This Act (apart from section 48) does not apply to:
(a) a religious body or a religious organisation in respect of which a proclamation is in force under section 26 of the *Marriage Act 1961* of the Commonwealth or a religious body, or an organisation or office, within a denomination in respect of which such a proclamation is in force, or
(b) a religious body or religious organisation prescribed by the regulations, or
(c) any body or organisation that is certified in writing by the principal or executive officer of a body or organisation referred to in paragraph (a) or (b) to be affiliated with and approved by the organisation or body so referred to, or

Consideration could be given in further drafting of the ACNC legislation to enabling governance arrangements within complex religious organisations and related entities and associated reporting requirements to be modified in a way that reflects their particular needs, and excluded from direct regulatory oversight by the ACNC. The eligibility criteria as set out in the NSW legislation referred to above would be a good model for such an exclusion. An alternative would be to link it to participation in a GST Religious Group.

In answer to the complaint that religious organisation might be being given favourable treatment it should be pointed out that their size and breadth of activity (not their character as religious) puts them into a different category from all other NFPs. To fail to take into account their particular circumstances is to discriminate against them and to burden them with compliance requirements which do not currently apply to them, that are unnecessary, and would be disproportionately costly. This fails to take account of the spirit of the National Compact and the commitment to respect the diversity of the NFP sector.

The role of religious organisations in the NFP (and particularly the charitable) sector is historical and substantial. Religious groups were providing benevolent and charitable works before government in Australia and any regulatory system needs to accommodate their continued participation on the same terms in order not to compromise delivery in key social service areas.

Entities that are capable of self-regulation in the area of governance should be free to do so.

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?

The ACBC is not convinced that any immediate reduction in red tape will occur. It is unlikely unless there is a commitment by states and territories to participate in a national regulatory regime. For example, where a charity is registered under state law but is also registered with the Australian Tax Office as a charity, the establishment of the ACNC alongside existing regulatory regimes in states and territories means almost certainly that some charities will be regulated by two levels of government.

As mentioned in the preliminary comments above, the ACBC would encourage the Commonwealth Government to revisit what we believe to be a major oversight in the

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(d) a member or employee of a body or organisation referred to in paragraph (a), (b) or (c), or any other person, who is acting with its authority.

(2) The Minister may, by order published in the Gazette, declare that, despite subsection (1), this Act and the regulations apply (or apply to the extent specified in the order) to a person, body or organisation specified in the order, and such an order has effect accordingly.

(3) By way of example of the power conferred by subsection (2), an order under that subsection may apply the provisions of Part 3 to a person, body or organisation that has failed to give a satisfactory reply to a request by the Minister for information concerning any fundraising appeal conducted by the person, body or organisation.

Regulatory Impact Statement, namely the impacts across the diversity of entities in the not-for-profit sector.

If the ACNC focuses on compliance rather than education of NFPs in its early years there will likely be an increase in red tape and compliance costs as the sector seeks to ensure it meets new requirements.

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

The ACBC is of the view that since the not-for-profit sector is generally very compliant, guidance and educational material will be of much more benefit in leading to best practice than legislative requirements. The sector is simply too diverse to easily regulate in a uniform or standardised way.

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

The ACBC notes that this refers to specific government registered Indigenous Organisations and defers to those who are involved with such organisations.

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?

The ACBC appreciates the laudable intentions of the government set out in Introduction to the Consultation Paper (p viii):

> The development of principles-based core rules for governance requirements for NFP entities is consistent with the vision of the *National Compact: Working Together* as it will assist in promoting a strong and sustainable NFP sector, through increased transparency and accountability. This will help to underpin and sustain a strong philanthropic engagement by the community and support for the vital work that the NFP sector undertakes, often on behalf of government.

The ACBC is not confident that the diversity of the sector can properly be respected through a legislative approach. An educative model is likely to provide better outcomes. Specific challenges that are presented by the size and complexity of religious organisations require further consideration and discussion as outlined in this submission.