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By email: ACNCReview@treasury.gov.au

Dear Mr Crowe

Review of the operation of the Australian Charities and Not-for-profits Commission Act 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance advisers and risk managers are unrivalled.

Our members are all involved in governance, corporate administration and compliance with the *Corporations Act 2001* (Corporations Act). Many of our members serve as officers of charities, or work for, or are involved with charities and are therefore involved in compliance with the requirements of the Australian Charities and Not-for-profits Commission (ACNC).

Governance Institute is itself a charity operating in the legal form of a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information. We have developed a suite of good governance guides for the not-for-profit sector which is freely available on our website aimed to assist not-for-profits improve governance practices in their organisations.

Governance Institute consults regularly with the ACNC through our membership of the ACNC Sector User Group and at other times by email. ACNC engages frequently with our members; ACNC staff regularly make themselves available to provide regulatory updates to our members and have been regular contributors to our monthly journal '*Governance Directions*'.

General comments

The charitable and not for profit sector makes an invaluable contribution to Australia's economy and social capital. Charities alone (which represent only 10 percent of the broader not-for-profit sector) employ more than one million people and contribute over \$140 billion to the economy. Charities and not-for-profits are supported by more than 6.1 million volunteers, generating a wage equivalent of \$15 billion each year. They deliver important community services including health, welfare, aged care, education, the arts and culture, sport, environmental protection and in a myriad of other areas that together form an essential part of Australia's social and economic infrastructure. The charitable and not-for-profit sector is playing a significantly increased role in providing human services in accordance with Government policy, making a healthy and well governed charitable and not-for-profit sector even more important for the community.

Governance Institute has long advocated for a one-stop national regulatory framework for the sector and a move away from the dual compliance regime which subjects charities that are incorporated associations to both state and federal legislation. Our support of the ACNC is based on its constructive presence as a regulator, its effectiveness in raising the accountability and governance standards of charities, and its success in providing significant education to the sector and providing the sector with visibility.

We welcome the opportunity to provide feedback on the review of the operation of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (ACNC Act) and commend Treasury for its consultation process.

Our more detailed comments are set out in the following pages.

We look forward to contributing our views on substantive issues that are identified by the Review Panel, including through roundtables and face-face consultation.

Kind regards

A handwritten signature in black ink, appearing to read 'Steven Burrell', with a long horizontal flourish extending to the right.

Steven Burrell
Chief Executive

Detailed comments

Question 1

Are the objects of the ACNC Act still contemporary?

Governance Institute supports the current objects of the ACNC Act and considers that they continue to be relevant and fit for purpose for the regulator.

We note recommendation two of the submission to the review from the ACNC (ACNC submission) that two additional objects be included in the ACNC Act namely:

‘To promote the effective use of the resources of not-for-profit entities; and

To enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.’

Governance Institute considers that improved accountability and improved effectiveness in the use of resources of not-for-profit entities is of benefit to the sector. However, we consider that effective use of resources and enhanced accountability may be more appropriately viewed as outcomes of improved governance and disclosure requirements rather than objectives.

Governance Institute recommends that the objects of the ACNC Act remain unchanged.

Question 2

Are there gaps in the current regulatory framework that prevent the objects of the Act being met?

We note recommendation ten of the ACNC submission that the ACNC Act be amended to give the Commissioner a discretion to publish the reasons for decision on an application for registration where the Commissioner considers that it would be in the public interest to do so.

Governance Institute agrees that some applications for registration would raise novel questions and that the Commissioner’s decision in such cases may be of broader interest or have precedent value. We support the ACNC recommendation that the secrecy provisions be amended to allow the Commissioner the discretion to publish the reasons for decision on an application for registration, where the Commissioner considers that it would be in the public interest to do so.

Governance Institute recommends that in addition, the Commissioner be given the discretion to make general disclosures which do not identify the specific organisation, but which operate as an educational tool or general principle to assist those seeking registration.

Question 3

Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?

Governance Institute considers that there are many potential benefits to extending the regulatory framework of the ACNC to other classes of not-for-profits and supports, in principle, the extension of the ACNC jurisdiction to not-for-profit organisations.

Currently, not-for-profit companies, which are not registered charities, are regulated by ASIC and are subject to the Corporations Act (or if they are incorporated associations, regulated by the relevant state and territory incorporated association legislation) while registered charities are regulated by ACNC. Many not-for-profit groups are comprised of entities which are regulated by different regulatory regimes, as they include entities which are registered charities as well as

not-for-profit entities which are not. It would improve accountability and transparency of the not-for-profit sector if all not-for-profit entities were covered by the same regulator. It would also benefit the general public to access information about all not-for-profit entities from the same register. The regulatory burden on groups with charitable and non-charitable entities would also be reduced as they would be complying with one set of regulatory obligations. Governance Institute notes that there are groups of companies which include for-profit entities which would always fall outside the scope of the ACNC.

The introduction of the ACNC register has greatly improved the accuracy and completeness of records for charities. The work of the ACNC in deregistering organisations has also greatly assisted this outcome. Extending the scope of the ACNC to all not-for-profit entities would greatly improve the data quality available in the not-for-profit sector. However, our members report that the ACNC register has poor search functionality. There is anecdotal evidence that members search the ASIC or ABR databases for the charity name in order to then locate it on the ACNC database.

The ACNC has been instrumental in providing education and guidance aimed at helping charities improve their governance and accountability. It would be of great benefit if the same education and guidance could be given to the general not-for-profit sector to assist entities improve their governance and risk management. These activities will help organisations improve their efficiencies, increase innovation, drive growth and reduce administrative costs.

The introduction of the 'report once, use often' reporting framework, which allows Government agencies to access data directly from the ACNC would also benefit not-for-profit entities providing services to Government. The efficacy of the 'report once, use often' framework will no doubt improve over time as more Government agencies avail themselves of access to the information and gain greater confidence in its accuracy and reliability.

Governance Institute considers that any increased regulatory burden imposed on not-for-profit entities would have to be proportionate to the benefits provided by the ACNC regime. In particular, Governance Institute considers that extending the current ACNC regime to small not-for-profit entities, particularly small community-based incorporated associations, may not be workable, and that a much reduced level of reporting may be more appropriate. The ACNC is currently a 'fee free' regulatory regime. If this approach were to change, and ACNC were to impose fees on its regulated entities, consideration would have to be given as to the cost burden this would place on many small not-for-profits.

Governance Institute recommends that any extension of the ACNC regulatory framework to not-for-profit entities only take place following broad consultation with all relevant stakeholders on the practical aspects of such a model to determine the appropriate level of regulation.

Definition of 'not for profit'

Governance Institute notes recommendation three of the ACNC submission that a statutory definition of 'not-for-profit' be introduced for the purposes of the ACNC Act and the Charities Act.

Governance Institute is generally supportive of the introduction of a statutory definition of 'not-for-profit'. We agree with ACNC that the wording of a statutory definition of 'not-for-profit' would require careful consideration. In particular, the definition would need to be clear that the provision of incidental private benefits to members of an organisation, or to charitable beneficiaries, does not preclude the organisation from being 'not-for-profit' under the general law or the Charities Act. By way of example, professional associations, such as Governance Institute provide benefits to members through the provision of professional education and networking events and opportunities.

Governance Institute recommends that any definition would need to clarify that professional associations and professional bodies can be included in the definition of 'not-for-profit', even though they provide benefits to members, but that importantly, there is no distribution of surplus to members on a winding up.

Question 4

What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?

Governance Institute considers that, criminal misconduct such as fraud or theft apart, issues surrounding charitable fundraising, including the costs of fundraising, are the activities and behaviours which have the greatest ability to erode public trust and confidence in the sector.

The current state and territory-based regulatory framework which governs charitable fundraising is fragmented, burdensome, rarely enforced and is fundamentally failing in its objective to protect donors and provide for transparency and public trust and confidence in fundraisers. As part of the #Fixfundraising coalition we have called on Government to reform the fundraising regulatory regime which can be achieved through three simple steps:

1. minor amendments to the Australian Consumer Law (ACL) to ensure application to fundraising activities is clear and broad
2. repeal of state-based fundraising laws, and
3. working with other regulators (for example, state-based regulators and self-regulatory bodies) to improve fundraiser conduct (for example, door-knocking, telemarketing, excessive spending of funds on third party services)

thereby effectively creating a nationally-consistent regulatory system.

Despite our public campaign which has received widespread community support, the Government has followed the recommendation of Consumer Affairs Australia and New Zealand and limited its response to clarifying through regulator guidance the current application of the ACL to the activities of charities, NFP entities and fundraisers. Charities and not-for-profits are forced to continue to waste significant amounts of time and money in meeting outdated fundraising laws that differ considerably across Australia

Governance Institute notes that fundraising reform falls outside the scope of a statutory review of the ACNC legislation. However, **Governance Institute recommends** that the review panel advise the Government of this matter and recommend that the steps outlined above be carried out.

Questions 5 and 6

Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?

Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?

Disqualified Persons Register

We note recommendation 39 of the ACNC submission that the regulations be amended to require the date of birth of the responsible person to be added to the ACNC Disqualified Persons Register. ASIC's equivalent disqualified persons register provides information about

people who have been disqualified from the management of a corporation. The ASIC register contains details of the name and address of the person or organisation and details of the disqualification, but does not contain the date of birth of the disqualified person.

Governance Institute recommends that in order to maintain consistency between regulators the date of birth of the responsible person not be added to the ACNC register of disqualified persons.

Inclusion of the company secretary on the register

As noted in the ACNC submission, the requirements under the Corporations Act to notify ASIC of certain matters, including change of address and the retirement and appointment of directors and company secretaries have been turned off for companies that are registered charities. As a consequence, ASIC does not maintain this information on its register. Additionally, responsibilities of company secretaries under section 188 of the Corporations Act have been turned off to the extent that they relate to other provisions of the Corporations Act that do not apply to charitable companies. The ACNC is aware of the inability of third parties such as financial institutions to check the names of current directors and company secretary of a charitable company by searching the ASIC register. Our members who are company secretaries of charities consistently report to us the practical issues their organisations face due to the inability of banks, landlords and other commercial parties, to check the details of responsible persons on the ASIC register. This difficulty is compounded by the fact that when directed to check the ACNC register, details of the company secretary do not appear unless the person is also a responsible person and listed as 'secretary'.

The Corporations Act provides for methods that companies can use to execute documents and statutory assumptions as to due appointment and authority upon which third parties can rely. The efficacy of this statutory regime relies on the directors and company secretary details being available for inspection to third parties on a register. Unfortunately, as a company secretary is not a responsible person and has no responsibilities under the ACNC Act there is currently no basis for the ACNC to be required to collect details about the company secretary or display those details on the ACNC register. This is a problem that requires a solution.

In its submission, the ACNC suggested that the notification requirement relating to company secretary details under the Corporations Act could be turned back on for charitable companies, thereby enabling ASIC to make this information available on its register. Governance Institute does not support this suggestion. Rather than reducing unnecessary obligations on charities, the effect of this suggestion would be to require them to update responsible person details to ACNC and company secretary details to ASIC. It would also require the public to search two separate statutory registers in order to obtain the details of the responsible persons and company secretary. We consider that this is an unnecessary and duplicative step which will cause public confusion and frustration.

Our members report, that in order to find a 'workaround' to this problem, some large charities have reverted to the practice of updating director and secretary details on the ASIC register in addition to the ACNC register. This requires the charities in question to pay ASIC lodgement fees, and, in instances where director and secretary details are out of date, fees for late lodgement.

We consider that it is vital to the efficacy, transparency and accountability of the sector that a charity's company secretary details are displayed on the ACNC register, together with the details of the charity's responsible persons. Placing the company secretary details on the ACNC register will then provide a 'one-stop shop' for third parties seeking details of the responsible persons and company secretary of a charity and will assist them in their dealings with the charity.

Governance Institute recommends that the Government consider amendments to the ACNC framework to enable the ACNC to include the company secretary details on the ACNC register for charitable companies.

Governance Institute also supports the suggestion made by ACNC in its submission that the Government amend section 129 (2) of the Corporations Act to enable a person dealing with an ACNC registered entity that is a company to rely on the assumption of due appointment and authority with respect to anyone who appears from information on the ACNC register to be a responsible person or company secretary of the registered entity.

Question 8

Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?

Governance Institute commends the work of the ACNC in reducing red tape for charities, in particular, its work with the states on harmonisation. We note that in order to assist charities, the ACNC accepts financial reports prepared for any state and territory incorporated associations, cooperatives and charitable fundraising regulators as meeting ACNC requirements. Governance Institute supports continuing the ability of the ACNC to accept reports provided to other agencies.

Governance Institute recommends that the Government continues to pursue regulatory harmonisation efforts and takes the lead in advancing inter-governmental co-operation. **We also recommend** that the Government encourage greater uptake by departments and agencies of the 'report once, use often' framework to reduce the reporting and paperwork which charities and not-for-profit organisations have to complete in order to provide services to the community.