



Life Activities Clubs Victoria Inc

Registered Incorporated Association: A0054351A ABN: 85 104 164 408

Submission re: Governance Standards for the not-for-profit sector

Who we are

Life Activities Clubs Victoria Inc. (LACVI) represents a network of incorporated Life Activities Clubs throughout Victoria that are run by volunteers on a non-profit basis.

Life Activity Clubs provide people in retirement or approaching retirement (typically aged 50 and over) with opportunities to enjoy a full, satisfying and connected community life and maintain lifelong wellbeing.

There are currently 24 Life Activities Clubs in Victoria (including 6 in regional centres) with each Club offering its members a wide range of recreational and social activities that provide physical, mental and social stimulation. The activities provided for the 4000 club members are determined by the interests of the members of each Club.

Submission

As a preliminary comment, it is noted that the Minister announced this consultation on 17 December 2012, but it was not advised to registrants on the Business Consultations list until 14 January 2013. Essentially half the available time to prepare a submission had elapsed before organisations such as ours became aware of the opportunity to contribute. It is unrealistic to expect carefully considered response on important matters to be prepared within such a timeframe by organisations that rely exclusively on the time and expertise of volunteer members and our submission may suffer somewhat as a consequence. It is noted that two consultations were announced simultaneously with the same deadline and this simply compounds the problem.

It is obvious that views differ widely across our membership and it is therefore not possible for any submission adequately to represent the breadth of opinion from such a diverse constituency. Having said that, the primary author of this submission works in a Not-For-Profit, has been involved in NFPs almost right through his life and has considerable experience analysing and interpreting his cohort's needs and aspirations. Other members of the Board who have endorsed this submission could claim comparable experience and expertise.

Against this background, the following comments are provided on the issues relevant to this Consultation.

The Standards

It is clear that none of the proposed Standards will be mandatory for our organisation at this stage, but along with many other NFPs we see great advantage in the ACNC assuming responsibility for the regulation of all incorporated associations, not just existing charities. In other submissions, we have argued that the existing definitions and classifications of organisations established to benefit sectors of society are

entirely inappropriate and that there is a great plethora of organisations such as ours that are at least (in many cases, substantially more) deserving of concessions than some that now have automatic access to benefits that are difficult to justify.

Although it might be some years before we become subject to these Standards, we expect to apply them to the extent possible on the basis that they are simply good practice and to facilitate the transition to compliance when it becomes mandatory. Indeed, most of the proposed principles are already encoded in some form in our Constitution and the Constitutions of all our member Clubs. We therefore have a clear interest in ensuring that the Standards are appropriate and practical and our comments stem from that desire.

A threshold issue that we regard as contrary to some of the discussion in the consultation paper is the use of the term 'best practice'. There is no such thing! At best, it may be argued that there may be better practices, but best practice is highly situational and depends on a wide range of factors and may change quite remarkably over quite short periods of time. Expecting all organisations to comply with, or even strive for, any externally-defined view of what is 'best practice' for a different organisation with different circumstances in a different time is dangerous and seriously risks encouraging organisations to adopt practices that are contrary to their best interests simply to 'get a tick' from the regulator.

The following specific comments are provided with respect to the proposed Governance Principles set out in the discussion paper.

Draft Standard 1 – Purposes and NFP nature of an entity

The Object is admirable and we regard the Standard to be generally appropriate, albeit not sufficiently comprehensive.

We believe that paragraph a) could be expanded by including specific reference to the practices of the entity, i.e., it should be able to demonstrate that it is complying with its documented purposes. We suggest that this clause should read 'be able to demonstrate, by reference to the governing rules of the entity, **by evidence of its actual practices**, or by other means, its purposes and its character as a not-for-profit entity'.

We also believe that, specifically for organisations that are soliciting and accepting (significantly reliant on) donations from the public, the Standard should include some limitation on the extent to which such donations are, or could be, diverted to purposes that are not those specified in its governing rules. For example, a charity could legitimately be delivering against the objectives in its governing rules, but could be utilising part of the funds contributed for this purpose to support an extraneous policy objective or some other project that might not attract the same level of public contribution if its existence and funding was more overt. The addition of a further clause indicating the extent to which public contributions were expended on the purposes set out in the governing rules might be appropriate for charities seeking funds from the public, although the argument is less cogent for other NFPs.

Draft Standard 2 – Accountability to members

The Object is admirable and we regard the Standard to be appropriate.

As noted in the discussion paper, the means by which compliance with this Standard may be established are many and varied, but it is a very important principle and one in respect of which the Regulator should expect a high degree of evidence if it is ever questioned.

Draft Standard 3 – Compliance with Australian laws

On the face of it, the Object is appropriate, but it contains words that assume things that may not be correct in practice. There is no compelling evidence that merely complying with the law will ensure an organisation's ongoing operations or the safety of its assets so it is suggested that these words should be deleted. The Object would appear to be just as appropriate if it read:

'The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in compliance with Australian laws (including preventing the misuse of its assets).'

The Standard is not easily understood by a lay person and may allow, even encourage, more 'wriggle room' than members of the organisation, or the public at large, would accept as reasonable. As a principle, we believe that all organisations should comply with all applicable laws and that the responsible entities should suffer the consequences of non-compliance. Although this may seem unduly severe, we consider this preferable to giving people even limited licence to ignore inconvenient aspects of the law – even if the circumstances indicate that enforcement may not be appropriate. In other words, we prefer a higher standard to be specified, but perhaps more lenience to be applied in the event of minor breaches.

This raises the issue of who should exercise the power to penalise breaches: in particular, to avoid the risk of double jeopardy where an innocent NFP may also be penalised as a result of some infraction by one or more of its responsible entities. As a rule, we consider the appropriate authority to be the Police or the agency primarily responsible for the enforcement of any specific piece of legislation. Unless action by the ACNC nullified the power of other agencies to pursue compliance and/or penalties, it would seem inappropriate to provide the Commissioner with a secondary power to impose some form of punishment. There also seems to be some risk in the proposed right to penalise someone who has not been charged with an offence or where the charge has not been proven. We accept that this may sometimes be a better (and cheaper) solution that is more acceptable to all parties, aggrieved and aggrieved, but there is a risk of injustice if a person could be deemed to be guilty before being proved innocent.

Draft Standard 4 – Responsible management of financial affairs

The Object is admirable and we regard the Standard to be appropriate.

'Responsible management' represents an eclectic range of factors that extend well beyond procedural issues or the outcomes of particular decisions. In the broad scheme of things, these factors are likely to be far less important to the long-term viability and stability of an organisation than the natural attitudes, abilities, knowledge and proclivities of its most influential decision-makers. One person's view of responsible management will vary from another person's assessment and a range of factors and opinions would need to be considered in forming an opinion, at least any opinion that could stand scrutiny, as to the appropriateness of the responsible entity/ies management style and behaviour.

As an example, natural risk-takers often act in very different ways from more conservative managers facing identical issues, but if the results of high-risk behaviour are particularly advantageous, the decision-makers will be lionised. A conservative approach may result in less favourable outcomes and the decision-makers are typically criticised. On the other hand, if the stakes are high and attract radical decisions that do not pay off, a more cautious manager will be congratulated whilst the one with his eye on the big prize is likely to lose his position. Who is, and how, to judge the criteria for 'responsible management' in such circumstances are clearly fraught questions.

Draft Standard 5 – Suitability of responsible entities

The Object is admirable but we believe the Standard faces a number of practical issues.

The requirement in paragraph 2) a) when linked with Paragraph 3) is relatively simple and with a publically-accessible register of disqualified people (the Subdivision 45-D Register), should theoretically be capable of compliance. It is suggested that there may well be other people who could and should be disqualified for reasons other than those set out in paragraph 3) so we strongly support the Commissioner's discretion as outlined in paragraph 4) c) (and its converse in paragraph 5) subject to the right of appeal referred to in Paragraph 6. We certainly support the power of the Commissioner to disqualify responsible entities and it is essential that the Register of disqualifications be maintained. Indeed, we can envisage circumstances where an organisation may wish to encourage the Commissioner to disqualify particular individuals endeavouring to exercise undue influence against the interests of the organisation by seeking appointment as a responsible entity.

The problem for many organisations such as ours is that there is no effective means of enforcing the standard in paragraph 2). Most committees are elected by the members from within the membership and in our situation, our Constitution provides that any member of any Club (several thousand people) may nominate or be nominated to the Board. The Council (one representative of each member Club, plus the Board members pro tem) then elect the Board from the nominations made. Essentially similar provisions exist in the Constitutions of every member Club in electing their Committees of Management. It would be almost impossible to amend these Constitutions to cater adequately for the restrictions inherent in paragraphs 3), 4) and 5) and equally difficult to constrain the nominations that may be put forward by any of so many members. It would, of course, be possible to require elected members to sign a suitable declaration as suggested in the discussion paper, but if anyone became disqualified as a result of such a requirement, the process of electing a replacement would be hugely complex. Our Constitution (and those of many of our member Clubs) do assist to some extent in that they require all responsible entities to have the support of the majority of the Council to become elected. In other words, even if insufficient (or barely sufficient) nominations are made to fill the available vacancies, no person can automatically be elected unless they receive the votes of at least half the Council members at the time of their election – even if that means that some vacancies are not able to be filled.

In summary, although we support the intent and the process outlined in this Standard, we envisage potentially insurmountable practical difficulties in implementing it. We would like to think that the need for any enforcement would be

very rare indeed, but this is an important factor that the Regulator might need to accept in the event of any review of an organisation's compliance in this area.

Draft Standard 6 – Duties of responsible entities

The Object is admirable and we believe the Standard is generally appropriate.

(It is noted that Note 2 under paragraph 3 refers to the application of paragraph (c). Should it not more appropriately refer to paragraph (d)?)**

It is, however, very complex and we hold grave concerns that subjecting potential responsible entities to such detailed and difficult requirements will exacerbate the already-dire problem of recruiting members to Boards and Committees. This is endemic to the Not-For-Profit sector and constitutes a major issue for a wide range of community organisations. The flood of recent regulation and the emphasis on imposing commercial-type obligations and liabilities (or worse) on relatively unskilled or naïve individuals wanting to do nothing more than volunteer their time for a good cause is already making it extremely difficult to populate committees with suitable people. Standards such as this, despite their desirability and good intentions, will only make this situation worse.

Having said that, there is little in this Standard that is not already incorporated in our current Constitutions. Most organisations already require committee members to act in good faith, in the interests of the organisation rather than their own, to disclose potential conflicts of interest, to apply their skills and knowledge to the best of their ability and so on. Indeed, some of our requirements are possible a little more onerous or specific than those in the Standard and we would probably prefer to rely on the simplified language used in our own documents rather than confront potential committee members with such extensive and complex requirements.

Timing issues

We have no concerns with timing. All organisations should already be complying very substantially with these Standards and the only significant issue would be that some may need a little time to be in a position to demonstrate their compliance. We imagine that none should need more than a few months to be able to do this.

Lindsay Doig
President, Life Activities Clubs Victoria Inc.
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