



Governance Standards for the Not-for-profit sector
The Treasury Consultation Paper, December 2012

Submission by UnitingCare Australia
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1. Executive summary

UnitingCare Australia is the Uniting Church's national body supporting community services and advocacy for children, young people, families, people with disabilities and older people. The Uniting Church's commitment to community services is an expression of the Christian vision of inclusion and equality of opportunity for all people and communities regardless of age, gender, sexuality, ability, class, colour, creed or cultural origin.

We have been an active participant in the consultation processes to establish the Australian Charities and Not-for-profits Commission (ACNC) and the Commonwealth Government's wider not-for-profit (NFP) reform agenda.

This submission provides our assessment of the proposed governance standards for entities registered with the ACNC¹. Our assessment has been made in consultation with the UnitingCare network and with regard to the Commonwealth Government's wider NFP reform agenda; in particular the findings of the Council of Australian Government's recently published Regulatory Impact Assessment (COAG RIA) of potential duplication of governance and reporting standards for charities².

We believe that further work is required to ensure that the governance standards are, as is the stated intention of the Government, principles based. We also believe that more needs to be done to ensure that the standards do not negatively impact on the independence and diversity of the NFP sector and also to limit the imposition of red tape on the sector both now and in the future.

The key recommendations discussed in this submission include:

- Introducing wording at *Subdivision 45.2* of the governance standards that requires the ACNC's compliance obligations and processes for the governance standards in *Subdivision 45-B* to be consistent with the *Objects of the ACNC Act*;
- Removing or further justifying the need for an explicit standard to deal with compliance with Australian law;
- Removing governance standard 4 and including it as part of governance standard 6 (duties of responsible entities);
- That the governance standards should only be implemented following the introduction of legislation to prevent "gag" clauses within Government funding agreements and new Commonwealth Grant guidelines as well as adequate progress in the development of the ACNC "Charity passport"; and
- That State and Territory Governments enter into an agreement with the Commonwealth to allow the requirements of the ACNC in relation to governance and/or reporting to satisfy the equivalent provision in State or Territory legislation.

¹ <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Governance-Standards-for-the-Not-for-profit-Sector> accessed 29 January 2013

² <http://www.coag.gov.au/sites/default/files/COAG%20Regulatory%20Impact%20Assessment%20of%20Potential%20Duplication%20of%20Governance%20and%20Reporting%20Standards%20for%20Charities.pdf> accessed 29 January 2013

2. Introduction

UnitingCare Australia represents the network of UnitingCare community services operating nationally across more than 1300 sites in metropolitan, rural and remote Australia. Our network is one of the largest providers of community services in Australia and we make a strong contribution to the Australian economy by providing services to over 2 million people each year, with an annual turnover in excess of \$2 billion, employing 35,000 staff and 24,000 volunteers nationally. We employ a holistic approach to supporting individuals and communities to access the resources and opportunities needed to live a decent life. We partner with governments, other organisations, communities and people of goodwill.

UnitingCare Australia has been an active participant in the consultation processes for the establishment of the Australian Charities and Not-for-profits Commission (ACNC). We have been consistent in our position that the legislative framework underpinning the operation of the ACNC must respect the diversity of our sector; promote the ongoing accountability and transparency of the sector whilst simultaneously eliminating the unnecessary administrative, reporting, acquittal and compliance costs imposed by Government. These important principles have been enshrined within the *Objects of the ACNC Act* and are the parameters against which UnitingCare Australia has assessed the proposed governance standards.

Accordingly we welcome this opportunity to contribute to the development of governance standards for not-for-profit (NFP) entities registered with the ACNC.

3. Overall assessment of the proposed Governance Standards

In undertaking our assessment of the proposed governance standards we have been mindful of the Government's commitment to design regulation that is fit for purpose, as stated by The Hon David Bradbury MP Assistant Treasurer and Minister Assisting for Deregulation:

"As the NFP sector grows, it is critically important to support the sector through smarter regulation. This involves designing a regulatory framework which is suited to the NFP sector and addresses flaws in the current approach to NFP regulation".³

Our assessment of the proposed governance standards has been made against the following parameters:

- Will implementation of the standards negatively impact on the independence and current diversity of the sector;
- Will implementation of the standards bring additional compliance costs;
- Do the standards meet the stated intention of reflecting a "minimum set of outcomes for registered charities"; and
- Will the proposed standards further the *Objects of the ACNC Act*.

Our assessment has also been informed by the Council of Australian Government's recently published Regulatory Impact Assessment (COAG RIA) of potential duplication of governance and reporting standards for charities⁴.

³ <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2012/011.htm&pageID=005&min=djba&Year=&DocType>
accessed 21 January 2013

It is our view that the proposed governance standards should be reworked to better reflect the Government's commitment to make the standards "principles-based" and to address the impact of additional compliance costs as identified in the COAG Regulatory Impact Assessment (COAG RIA).

4. Specific comments on the Consultation Paper

4.1 The case for introducing governance standards

The *ACNC Act* sets the requirement for all NFP entities registered with the ACNC to comply with governance standards subsequent to the *Act* itself.

The Consultation Paper states that the "these standards will also serve to underpin public trust and confidence in the sector"⁵, a sentiment we welcome. We also note that "the proposed governance standards aim to consolidate and deliver an element of consistency to the broader governance arrangements for charities"⁶. Again we welcome this stated aim which we believe highlights the need for Commonwealth, State and Territory governments to address the findings of the COAG RIA as a matter of priority if we are to see any mitigation of unnecessary and duplicative red-tape.

Introduction of the *ACNC Act* was a historic achievement and supported by the majority of the NFP sector. Key to this support was the establishment in legislation of objects which require the ACNC to act in a manner which:

- supports and sustains a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- promotes the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The proposed governance standards are likely to be the most important action triggers available to the ACNC and care must be taken to ensure that their implementation does not allow for the creation of administrative compliance obligations, which by their form interfere with or change the lawful practices of a registered entity. Whilst we recognise that the governance standards limit the ACNC's capacity to specify how an entity is to achieve its outcomes (*Division 45-10 (2)(b)(i)* refers), the *ACNC Act* itself does not limit the capacity of the Regulator to introduce new compliance obligations that would require entities to amend or introduce new practices in order to comply with the standards.

We believe that the compliance obligations in relation to governance standards, particularly standards 4, 5 and 6, are at risk to regulatory creep. Therefore, we recommend that a statement be included in the standards which seeks to explicitly link the ACNC's development and implementation of the compliance obligations and processes to the Objects of the *ACNC Act* as at *Division 15-51(b) and (c)*.

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<http://www.coag.gov.au/sites/default/files/COAG%20Regulatory%20Impact%20Assessment%20of%20Potential%20Duplicati on%20of%20Governance%20and%20Reporting%20Standards%20for%20Charities.pdf> accessed 29 January 2013

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http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/Governance%20Standards%20for%20the%20Not-for-profit%20Sector/Key%20Documents/Downloads/PDF/Governance_Standards_Consultation_Paper.ashx

p.6, accessed 4 February 2013

⁶ Ibid p.8

Recommendation: To include wording at Subdivision 45.2 of the governance standards to the following effect:

The compliance obligations and processes of the governance standards in Subdivision 45-B must be consistent with the Objects of the ACNC Act.

4.2 Principles based approach and compliance

We support the intention, as stated in the Consultation Paper⁷, for the development of governance standards to “reflect a minimum set of outcomes for registered charities, rather than mandate ‘best practice governance’ or detailed procedures and requirements necessary for effective not-for-profit (NFP) governance”. This focus is consistent with discussion and agreement reached during the consultation process for the ACNC Act.

The Consultation Paper states that the proposed governance standards will “...inform the enactment of minimum legislative standards, the ACNC will work with the sector to encourage and promote ‘best practice’ over and above this minimum”⁸. NFP entities must be able to ensure that their governance arrangements are appropriate to their operations and mission. To this end we believe that regulatory standards must remain principles-based in order to preserve the ability of the sector to develop governance procedures and practices which reflect the diversity of the sector itself; it is this diversity that enables NFP entities to engage across the diversity of the Australian community. There is room to improve the standards to better reflect the intentions of the Government and the sector more broadly to have principle-based standards. This is particularly the case in relation to the proposed Governance standards 3 and 4, the issues around which are discussed later in this submission.

4.3 Discussions with State and Territory Governments

UnitingCare Australia welcomes the critical role of the ACNC in seeking to reduce the burden of unnecessary and duplicative regulation imposed on NFP entities by governments and their agencies.

The COAG RIA identifies a number of areas of duplication between the ACNC and State Regulators regulating the NFP sector. Although the COAG RIA identifies only a relatively small number of areas of duplication between the Commonwealth and State Regulators it does highlight the number of additional compliance obligations⁹ that the sector will face as a result of the introduction of the ACNC and the proposed governance and reporting requirements. We acknowledge that the Commonwealth Government is committed to reducing red-tape through improvements to the Commonwealth Grants Guidelines and by introducing a “Charities Passport” but as neither has yet been implemented any increases in compliance obligations are material to many entities within the UnitingCare network.

In further developing the governance standards we believe it is critical to address the findings of the COAG RIA. In particular to acknowledge that all but one of the proposed principles will impose new and additional requirements for NFP entities which will result in additional costs to those entities. The COAG RIA has not identified the likely implementation costs for NFP entities but feedback from our network indicates that these costs are likely to be considerable for smaller entities.

⁷ Ibid p.6

⁸ Ibid p.9

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<http://www.coag.gov.au/sites/default/files/COAG%20Regulatory%20Impact%20Assessment%20of%20Potential%20Duplication%20of%20Governance%20and%20Reporting%20Standards%20for%20Charities.pdf> p.53 accessed 29 January 2013

4.4 Proposed Governance Standards

Standard 1: Purpose and NFP character of a charity

NFP entities are defined and guided by their mission or purpose. For most UnitingCare entities this is defined in their constitution and/or governing documents. The NFP character of an entity is, as stated in the Consultation Paper¹⁰, endorsed by its registration with the ACNC and charitable status is granted under existing arrangements.

The omission of a definition of 'not-for-profit' within the Consultation Paper is of concern. Accordingly, we believe that it is in the interests of governments, the sector and the public to have a clear and consistent definition of 'not-for-profit' included in the governance standards.

Interestingly, the COAG RIA identified this standard as being a new and additional requirement for all types of NFP entities which will result in additional costs for entities¹¹. We believe that the ACNC can mitigate the need for additional compliance costs by accepting current documentation, in whatever form, unless there is a significant omission which would likely cause the entity to fail in its obligations under this standard. Where a significant omission occurs it is our expectation that the entity would be able to address the omission through the use of standardised templates obviating the need to seek and pay for legal advice.

Recommendation: to introduce an agreed definition of 'not-for-profit' and to develop standard reporting templates for entities which do not have written documentation or other sufficient evidence to demonstrate compliance with this standard.

Standard 2: Accountability to members

We support the principle of this standard which is based on the Corporations Act and related instruments. However, we anticipate that it will require a considerable change of practice for a number Uniting Church and UnitingCare entities and others in the sector in order to comply.

The Uniting Church is primarily an unincorporated association of religious individuals who are able to exercise a wide variety of ministries through the authority of national regulations and synod by-laws. Our network includes unincorporated entities, church constituted unincorporated bodies and congregations, companies limited by guarantee, incorporated associations, public ancillary funds and trusts. While the COAG RIA¹² identifies this standard as imposing an additional burden on parts of the sector we believe that this would be minimal for most UnitingCare agencies.

Recommendation: for the ACNC to provide tailored and timely advice to support NFP entities comply with this standard.

Standard 3: Compliance with Australian law

We are not convinced of the need to have this as a governance standard. The Consultation Paper states that "the purpose of the draft standard is to enable the ACNC to take appropriate

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http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/Governance%20Standards%20for%20the%20Not-for-profit%20Sector/Key%20Documents/Downloads/PDF/Governance_Standards_Consultation_Paper.ashx p.11 accessed 4 February 2013

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<http://www.coag.gov.au/sites/default/files/COAG%20Regulatory%20Impact%20Assessment%20of%20Potential%20Duplication%20of%20Governance%20and%20Reporting%20Standards%20for%20Charities.pdf> p.53 accessed 29 January 2013

¹² Ibid p.53, accessed 29 January 2013

regulatory action”¹³ and the object is “to ensure on-going compliance and the safety of assets”¹⁴. We believe that the powers of the Commissioner are already sufficiently robust to take the necessary actions to address breaches of the *ACNC Act*.

We believe that further justification is required; in particular how this standard relates to the regulatory powers of the ACNC Commissioner as defined in the *ACNC Act*.

Recommendation: to omit this standard. However if there is a strong justification for a provision like this to remain within the standards then we believe it should be reworked and be included as part of the standard related to the duties of responsible entities.

Standard 4: Responsible management of financial affairs

UnitingCare Australia, like most other NFP entities, agrees that there is duty placed upon a Board and/or management to responsibly manage the financial affairs of the entity. However we do not believe that this should be a governance standard in its own right.

Highlighting financial management as a governance standard will not achieve its proposed object; instead it has the potential to distort investment, service and program decisions to limit potential breaches of this standard.

We believe that any reference to responsible financial management should be considered as the duties of responsible entities.

Recommendation: remove and include this principle within the standard related to duties of responsible entities.

Standard 5: Suitability of responsible entities

We support the principle of allowing the ACNC to disqualify responsible entities and maintain a disqualified responsible entities register. We believe there is merit in linking this register to comparable ASIC registers.

That said, we urge careful consideration be given as to how the ACNC undertakes its investigations and the process for deciding whether or not to put a responsible entity on the register. Specifically we suggest that further information is provided as to how the ACNC will address issues of confidentiality during investigations of responsible entities.

Recommendation: provide further details (or direct reference to the ACNC Act) around confidentiality of investigations.

Standard 6: Duties for responsible entities

We are generally satisfied with the duties as outlined in this standard. However, our assessment of this standard indicates that it will likely duplicate a number of regulations that are currently applied to responsible entities under State/Territory, service specific and licensing regulations. As outlined in the COAG RIA¹⁵ the inclusion of this standard in its

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http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/Governance%20Standards%20for%20the%20Not-for-profit%20Sector/Key%20Documents/Downloads/PDF/Governance_Standards_Consultation_Paper.ashx

p.14, accessed 4 February 2013

¹⁴ Ibid p.15, accessed 4 February 2013

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<http://www.coag.gov.au/sites/default/files/COAG%20Regulatory%20Impact%20Assessment%20of%20Potential%20Duplication%20of%20Governance%20and%20Reporting%20Standards%20for%20Charities.pdf> p.53 accessed 29 January 2013

current format will impose new and additional requirements on NFP entities at a cost to the entities themselves.

Recommendation: introduction of this standard should occur subject to further consultation with State and Territory governments about how they will address the duplication of reporting for NFP entities.

4.5 Transitional reporting period

We believe that the transitional period which NFP entities will have to make changes to their governance rules in order to comply with the governance standards is a reasonable timeframe. It is critical that the ACNC provides timely guidance and education for those who need it during the transition period. Feedback from our network indicates that the greatest impact of the proposed standards will be on small NFP entities and therefore we urge the ACNC to make provision to tailor its guidance to individual entities.

5. The way forward

The *ACNC Act* is the cornerstone of the Commonwealth Government's NFP agenda. The core principles of which are to uphold the ongoing accountability and transparency of the sector whilst simultaneously eliminating the unnecessary administrative, reporting, acquittal and compliance costs. We believe that the development and implementation of governance standards for NFP entities registered with the ACNC must uphold all of these core principles of the reform agenda.

As such, we believe that these standards should only be implemented after legislation to prevent "gag" clauses within Government funding agreements is enacted, agreed modifications to the Commonwealth Grant Guidelines are in place and the "Charity Passport" is sufficiently advanced to ensure that registered entities that have provided organisational and or financial information to the ACNC will not be required to provide similar information to other Commonwealth agencies.

Furthermore, we encourage Commonwealth, State and Territory governments to act quickly on the findings of the COAG RIA and implement as soon as possible Option 4B¹⁶ of the COAG RIA whereby States and Territories enter into an agreement with the Commonwealth to allow the requirements of the ACNC in relation to governance and/or reporting to satisfy the equivalent provision in State or Territory legislation. We also ask that action in relation to reducing unnecessary reporting and compliance on the NFP sector be made a priority and elevated to the Ministerial level.

6. Conclusion

In isolation and subject to the amendments outlined in this submission, the proposed governance standards would not pose a significant problem for agencies in the UnitingCare network. However, it must be acknowledged that the introduction of the proposed governance standards and new reporting obligations will increase the work of the sector. As such we believe that it is essential that the increase in administrative burden be partially offset by ensuring that agreed red-tape reduction measures announced by the Government are in place

¹⁶ Ibid p.49

at the same time (or preferably prior to) the introduction of the proposed governance standards. We also call on all State and Territory Governments to work with the Commonwealth Government and the NFP sector more broadly to introduce the necessary legislation which will reduce the unnecessary and costly red-tape on the sector so that we can invest more of our resources and energy to providing vital services to the marginalised and disadvantaged members of our society.