

SDN Children's Services

Response to Development of
Government Standards,
December 2012 Consultation
Paper

CONSULTATION PROCESS

Request for feedback and comments

This paper seeks feedback on proposals to introduce governance standards for charities registered with the Australian Charities and Not-for-profits Commission (ACNC).

The consultation period has been set to provide the maximum time for engagement, having regard to consultation occurring over the Christmas and New Year period and the need to provide certainty to the NFP sector on final standards which will commence on 1 July 2013.

Submissions should include the name of your organisation (or your name if the submission is made as an individual) and contact details for the submission, including an email address and contact telephone number where available.

While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Submissions which are not requested to remain in confidence will be uploaded to the Treasury website shortly after they are received.

Closing date for submissions: 15 February 2013

Email: NFPReform@treasury.gov.au

Mail: Manager
Philanthropy and Exemptions Unit
Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Enquiries: Enquiries can be initially directed to Nathan Unitt

DRAFT STANDARD 1 :PURPOSES AND NFP CHARACTER OF A CHARITY

Draft governance standard 1: Purposes and NFP nature of a registered entity

45.5 Standard 1 –purposes and NFP nature of a registered entity;

Object

- 1) The object of this governance standard is:
- a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and
 - b) to give the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purposes.

Standard

- 2) A registered entity must:
- a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and
 - b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and
 - c) comply with its purposes and its character as a not-for-profit entity.

Note Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register, in an Australian law on www.comlaw.gov.au or www.austlii.edu.au, or is otherwise made available on request.

Does draft standard one establish the appropriate principles?

Is the wording of draft governance standard one appropriate?

SDN Response:

Yes. The purpose needs to be clear to all stakeholders & the public.

The wording is adequate.

DRAFT GOVERNANCE STANDARD 2: ACCOUNTABILITY TO MEMBERS

Draft governance standard 2: Accountability to members

45.10 Standard 2 –accountability to members

Object

1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

2) A registered entity that has members must take reasonable steps to ensure that:

- a) the registered entity is accountable to its members; and
- b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1 The steps that a registered entity may take to ensure it is accountable to its members include holding annual general meetings, providing members with an annual report (including financial information and achievements towards its purpose) and providing for elections for its responsible entities.

Note 2 The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns include holding an annual general meeting with a question and answer session and providing an opportunity for members to propose resolutions and to vote upon those resolutions.

Does draft standard two establish the appropriate principles?

▶

Is the wording of draft governance standard two appropriate?

SDN Response:

The draft establishes the basic principles & the wording is currently adequate.

DRAFT GOVERNANCE STANDARD 3: COMPLIANCE WITH AUSTRALIAN LAWS

Draft governance standard 3: Compliance with Australian laws

45.15 Standard 3 – compliance with Australian laws

Object

1) 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 a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Standard

2) A registered entity must not engage in conduct, or omit to engage in conduct, that may be dealt with:

a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or

b) by way of a civil penalty of 60 penalty units or more.

Note 1 See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2 While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.

Does draft standard three establish the appropriate principles?

Is the wording of draft governance standard three appropriate?

SDN Response:

This a basic requirement for all Charitable organisations.

DRAFT GOVERNANCE STANDARD 4: RESPONSIBLE MANAGEMENT OF FINANCIAL AFFAIRS

Draft governance standard 4: Responsible management of financial affairs

45.20 Standard 4 – responsible management of financial affairs

Object

- 1) The object of this governance standard is to ensure that a registered entity manages its resources responsibly, in a way that effectively furthers its purposes and protects its resources from misuse.

Standard

- 2) A registered entity must take reasonable steps to manage its financial affairs in a responsible manner.

Does draft standard four establish the appropriate principles?

Is the wording of draft governance standard four appropriate?

SDN Response:

Covers the very basic principle of a charitable organisation. There should be distinction & recognition for entities that have additional & formal mechanisms in place to ensure resources are efficiently utilised and financial affairs managed responsibly, for example fully audited.

9

DRAFT GOVERNANCE STANDARD 5: SUITABILITY OF RESPONSIBLE ENTITIES

Draft governance standard 5: Suitability of responsible entities

45.25 Standard 5 – suitability of responsible entities

Object

- 1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

- 2) A registered entity must:

- a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and

b) after taking those steps:

i) be, and remain, satisfied that each responsible entity meets the conditions; or

ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Examples of reasonable steps

Reasonable steps may include obtaining declarations from responsible entities and the searching of public registers.

3) Subject to subsection (5), the conditions for each responsible entity are that it is not:

a) disqualified from managing a corporation, within the meaning of the Corporations Act 2001; or

b) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

Note Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this standard if:

a) the entity has been previously suspended or removed as a responsible entity of any registered entity, under Division 100 of the Act; and

b) the entity has been given notice of its disqualification by the Commissioner; and

c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.

5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.

6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision

in the manner set out in Part 7-2 of the Act.

Subdivision 45-D Register

45.150 Register of disqualified responsible entities

- 1) The Commissioner must maintain a register, to be known as the Disqualified Responsible Entities Register, in which the Commissioner must include the following information:
 - a) the name of the entity disqualified by the Commissioner from being a responsible entity of a registered entity, under subsection 45.25 (4);
 - b) the date that the entity was disqualified by the Commissioner;
 - c) whether the disqualification remains subject to review, under Part 7-2 of the Act.
- 2) The Register must be maintained by electronic means.
- 3) The Register must be made available for public inspection, on a website maintained by the Commissioner.

Does draft standard five establish the appropriate principles?

Is the wording of draft governance standard five appropriate?

SDN Response:

It is important that the same standards apply to those managing Charitable organisations, whether large or small or unincorporated, as those managing large corporations under Corporations Law. The only exception, and only to be granted on application & review, when the purpose of the charity requires the experience of such a person i.e. Organisation of rehabilitation of criminal offenders may find it appropriate to include such ex-offenders.

Under the standard it is the responsibility of the Charity to take reasonable steps to ensure that all responsible entities are not disqualified from managing corporations. Reasonable steps, include checking of registers such as ASIC Disqualified Persons Register and signed declaration confirming the person is not an undischarged bankrupt nor convicted of a Corporation's Act, nor fraud offence.

Are there concerns with allowing the ACNC to disqualify responsible

entities and maintain a disqualified responsible entities register?

SDN Response:

No concerns, however, why duplicate such a registry if one already exists with ASIC and the same principles apply. Only exceptions authorised by ACNC, due to the nature of a particular charity, should be maintained.

DRAFT GOVERNANCE STANDARD 6: DUTIES OF RESPONSIBLE ENTITIES

Draft governance standard 6: Duties of responsible entities

45.30 Standard 6 –duties of responsible entities

Object

1) The object of this governance standard is:

a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:

i) the relationship between them and the entity were a fiduciary relationship; and

ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and

b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:

i) is acting to prevent non-compliance with the duties imposed on responsible entities; and

ii) if non-compliance with the duties imposed on responsible entities occurs –will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:

a) to exercise the responsible entity's powers and discharge the

responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;

- b) to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity;
- c) not to misuse the responsible entity's position;
- d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
- e) to disclose perceived or actual material conflicts of interest of the responsible entity;
- f) not to allow the registered entity to operate while insolvent.

Note 1 This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2 Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3 For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

3) For paragraph (2) (e), a perceived or actual material conflict of interest must be disclosed:

- a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
- b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
- c) if the registered entity is a company—to the members of the registered entity; or
- d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1 **Company** is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2 Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors

have a similar conflict.

Note 3 Part 7-6 of the Act provides for the approval of forms.

4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).

5) In this section:

insolvent has the meaning given by subsection 95A (2) of the *Corporations Act 2001*.

Draft protections to standard 6

Subdivision 45-C Protections under governance standard 6

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.30.

45.105 Protection 1

1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies, on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:

- a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
- b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
- c) another responsible entity in relation to matters within their authority or area of responsibility; or
- d) an authorised committee of responsible entities that does not include the responsible entity.

2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the

complexity of the structure and operations of the registered entity.

45.110 Protection 2

- 1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:
 - a) the responsible entity makes the decision in good faith for a proper purpose; and
 - b) the responsible entity does not have a material personal interest in the subject matter of the decision; and
 - c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate; and
 - d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

2) In this section:

decision means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

45.115 Protection 3

- 1) A responsible entity meets this protection if any of the following are satisfied:
 - a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
 - b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note This protection relates to the duty mentioned in paragraph 45.30 (2) (f).

45.120 Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

Does draft standard six establish the appropriate principles?

Is the wording of draft governance standard six and the draft protections appropriate?

SDN Response:

Under the draft standard the obligation to comply is placed on the registered charity, rather than the responsible entities. The registered entity must take reasonable steps to ensure that its responsible entities are subject to and comply with, the duties. Reasonable Steps for the registered entity is not defined in the standard. Rather the registered entity i.e the Charity is reliant on the responsible entities i.e the Board members or directors to comply.

The Charity could exercise powers for employees to ensure compliance, however it would be difficult to direct Board members to whom the Charity itself reports. Nor does the Charity know the knowledge contained within a Board members mind nor the extent to which due consideration of matters has been deliberated when the Charity staff, may not be privy to all discussions held by the Board.

It is recommended that the responsibility remains with the responsible entity, when that entity is part of the Governing Board of the registered Charity. However, the expectations may be lower than that required for Directors by ASIC, as consideration needs to be given to the fact that these are volunteer positions and not paid positions.

Are there any additional protections which should only be provided to volunteer responsible entities?

If so, what would these protections be?

SDN Response: As per above, volunteer positions on the Board of a Charity whilst accountable, need to reflect the volunteer nature of the position and thus lower penalties.

TIMING ISSUES

Are the transitional arrangements proposed adequate?

SDN Response:

As SDN is already complying with the majority of issues raised, the timing will not be an issue.

SDN Children's Services

Response to Draft Requirements for the Annual Financial Reports under the ACNC Framework

December 2012 Consultation Paper

All entities will be required to provide an annual information statement, which will be due for the 2012-13 year and lodged with the ACNC by December 31st. The information required is not yet defined in the draft framework, but the extent will depend on the size of the organisation.

Annual Financial Reports are only mandatory for medium & large, registered entities which include SDN. SDN complies with the requirements of General Purpose Reports, with the SDN Annual Audited Financial Reports.

The Annual financial report consists of the following three elements:

- the financial statements for the year
- the notes to the financial statements; and
- the declaration made by the responsible entities about the financial statements and the notes.

The financial statements and notes will, in most cases, need to comply with accounting standards issued by the Australian Accounting Standards Board (AASB). There are some exceptions to the requirement to apply accounting standards, which are discussed below.

The notes must contain any other information necessary to give a true and fair view of the financial position and performance of the registered charity.

It is clear that SDN already complies with the Financial reporting requirements with the fully Audited Annual Financial Statements lodged with ASIC. It is not clear whether SDN needs to lodge with both organisations and if not which organisation will transfer the details to the other.