



Catholic Social Services  
**Australia**

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## **Catholic Social Services Australia**

Response to the Development of  
Governance Standards Consultation  
Paper, December 2012

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# 1 Executive summary

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Catholic Social Services Australia (CSSA) is the peak organisation representing 66 Catholic social service agencies delivering services throughout Australia.

CSSA considers that not all of the draft governance standards are principles based, which is inconsistent with policy and legislation.

During the development of the Australian Charities and Not-for-Profit Commission (ACNC) Act, significant efforts were made to address concerns that the Draft Governance Standards would be overly prescriptive. Both the explanatory memorandum and the supplementary explanatory memorandum to the ACNC Act reflect an intention by Government to address those concerns and ensure that the governance standards be principles based. Both the explanatory memorandum and the supplementary memorandum state words to the effect that “Governance standards are expected to generally be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation.

CSSA asserts the position that whilst Standards 1,2 and 3 need amending – they do not contradict the stated intent of the governance standards. The main focus of this submission is on Standards 4, 5 and 6.

CSSA is concerned that the impact of the draft governance standards on the sector will increase red-tape and regulatory compliance for the sector. This contradicts one of the intentions of the ACNC Act.

CSSA remains concerned that good intentions expressed by both the Federal Government and the ACNC have not been realised. We believe that the Federal Government and the ACNC have an imperative to deliver on a number of outcomes aimed at reducing red tape. These include:

- 1.1 State/Territory/Federal harmonisation of regulatory requirements
- 1.2 Timely development and introduction of the Charity Passport
- 1.3 Enacting legislation to prevent anti-‘gag’ clauses within Government funding agreements

The current body of work focusing on governance standards needs to be viewed within the broader context of NFP reform. At the present time there are a number of consultation processes in train:

- (a) the Consultation process focusing on the draft regulations and accompanying explanatory material outlining the proposed financial reporting requirements applying to charities registered with the ACNC;
- (b) current revision of ACNC’s recommended Standard Chart of Accounts;
- (c) the ACNC’s Regulatory Approach Statement consultative process; and,
- (d) COAG’s Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities,

Matters pending include the:

- (a) Definition of “Charity”;
- (b) Proposed changes to the definition of not-for-profit; and,
- (c) Proposed changes to the ‘in Australia’ requirements.

CSSA has been a keen contributor to the NFP reform debate at all levels. We remain committed to achieving the stated objectives of the ACNC Act aimed at maintaining, protecting and enhancing public trust in the Australian NFP sector; supporting and sustaining a robust, vibrant, independent and innovative Australian NFP sector; and promoting the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector. CSSA makes this submission in keeping with these objects.

## 2 Introduction

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- 2.1** Catholic Social Services Australia (CSSA) welcomed last minute changes to the Australian Charities and Not-for-Profit Bill at the end of last year which formally acknowledged the value of the not-for-profit sector in developing a set of governance standards for registered entities with the Australian Charities and Not-for-profits Commission (ACNC), regardless of entity type.
- 2.2** In December 2012 the Commonwealth Government of Australia released the document titled “Development of governance standards Consultation Paper December 2012” (Consultation Paper). The Consultation Paper sought feedback on the draft governance standards contained in the Consultation Paper (draft governance standards).
- 2.3** This submission on the draft governance standards is made by CSSA.
- 2.4** CSSA has concerns with the draft governance standards and considers that a number of them should be removed or significantly amended.
- 2.5** For ease of reference, CSSA has set out the relevant section of the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) which allows the governance standards to be established:

### Section 45-10 Regulations establishing governance standards

- (1) The regulations may specify standards (the *governance standards*) with which an entity must comply in order to become registered under this Act, and to remain entitled to be registered under this Act.
- (2) Without limiting the scope of subsection (1), those standards may:
- (a) require the entity to ensure that its governing rules provide for a specified matter; or
  - (b) require the entity to achieve specified outcomes and:
    - (i) not specify how the entity is to achieve those outcomes; or
    - (ii) specify principles as to how the entity is to achieve those outcomes; or
  - (c) require the entity to establish and maintain processes for the purpose of ensuring specified matters.
- (2A) Without limiting subparagraph (2)(b)(ii), the principles mentioned in that subparagraph may reflect the size of the entity, the amount and nature of contributions to the entity and the nature of the activities undertaken by the entity in pursuit of its purposes
- 2.6** CSSA’s comments are focused on achieving these outcomes.

### **3 Catholic Social Services Australia**

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CSSA is the national peak organisation representing 66 Catholic social service organisations. These agencies provide around \$700 million each year in quantifiable social services to the Australian community. The unquantifiable value of these services, taking into account the 'value add' nature of social services delivered by not-for-profit providers, would certainly be higher.

Members of CSSA employ over 10,000 staff and are assisted in their work by around 4,000 volunteers. The range of services provided by CSSA members includes:

- Aged care
- Child care and children's services
- Community detention
- Disability services
- Drought and emergency relief
- Drug and alcohol services
- Employment services
- Employee assistance programs
- Family and Relationships Services
- Financial counselling
- Foster care
- Gambling counselling
- Housing and homelessness services
- Immigration settlement
- Indigenous services
- Mental health and counselling services
- Other counselling services, including financial counselling, gambling counselling, and school counselling
- Pastoral ministries
- Policy and research
- Pregnancy counselling and support
- Residential care
- Youth services

The majority of CSSA members are medium to large organisations.

## 4 The governance standards within the not-for-profits reform context

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4.1 A dominant theme throughout not-for-profits (NFP) reform discussions since the Australian Labor Party pre-election commitment and including in the final report of the Treasury's Scoping Study in 2011<sup>1</sup>, has been about measures to enhance the sector's capacity. This has especially focussed on reducing red tape and duplication of administrative processes. The December 2011 Consultation Paper exploring the topic 'Review of not-for-profit governance arrangements' acknowledged that:

- (i) "duplication during a transitional period might result while Australia moves towards a truly national NFP regulation, however the governance arrangements are likely to be similar and not pose a large burden on NFPs".<sup>2</sup>

The Final Report of the Scoping Study for a National Regulator, stressed the importance of achieving COAG agreement on key aspects of regulatory reform:

- (i) Through the COAG process, the Australian Government should work with state and territory authorities with the aim of ensuring that the regulator's registration applies throughout Australia, and be accepted by every government agency. (Recommendation 9)

4.2 The absence of a framework agreement for harmonisation with State and Territory governments points to an extended transition to achieve the goal of a harmonised national regulator. CSSA continues to remain troubled that despite repeated advice on the critical role of State and Territory governments in achieving regulatory harmonisation for the NFP sector, there is still an absence of a framework agreement for achieving a harmonised national regulatory environment.

- (a) CSSA acknowledges the release on 25 January of the Council of Australian Government's "Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities" (COAG RIA). However, this seems but a first step in a process which should ideally be further advanced than it currently is.
- (b) Ideally, we encourage Commonwealth, State and Territory governments to act quickly on the findings of the COAG RIA and implement as soon as possible Option 4B 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 the State or Territory legislation.

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<sup>1</sup> Australian Government: The Treasury, "Final Report – Scoping Study for a National Not-for-Profit Regulator", April 2011

<sup>2</sup> Review of not-for-profit governance arrangements", Consultation Paper, December 2011. p3

- 4.3** The Charity Passport<sup>3</sup> to be developed by the ACNC is a reporting mechanism which will provide a more streamlined and centralised method for accrediting charities and NFPs. CSSA has consistently supported the development of the Charity Passport on the basis that this ‘tool’ is intended to be used to streamline regulatory requirements across Federal agencies. CSSA recommends that development and implementation of the Charity Passport be fast-tracked given that the power to address the necessary legislative and administrative arrangements to activate its use sit squarely within the authority of the Federal Government.
- 4.4** Another feature of NFP reform yet to be realised is the legislation to prevent ‘gag’ clauses within Government funding agreements. In September last year, CSSA issued a media release<sup>4</sup> welcoming this announcement as it has the potential to ensure the critical role that CSSA and its members play in public discourse is not only protected but valued. CSSA recommends that this legislation be introduced to Parliament without delay.
- 4.5** Alongside these issues and the current governance standards consultation framework exists under a number of other significant consultative processes in train being run by the Federal Government. These include:
- (a) the Consultation process focusing on the draft regulations and accompanying explanatory material outlining the proposed financial reporting requirements applying to charities registered with the ACNC;
  - (b) current revision of ACNC’s recommended Standard Chart of Accounts;
  - (c) the ACNC’s Regulatory Approach Statement consultative process; and,
  - (d) COAG’s Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities,

Matters pending include the:

- (a) Definition of “Charity”;
- (b) Proposed changes to the definition of not-for-profit; and,
- (c) Proposed changes to the ‘in Australia’ requirements

These should factor within the context of the debate regarding the draft governance standards.

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<sup>3</sup> The purpose of the Charity Passport is contained in the Australian Charities and Not-for—Profits Commission Bill 2012, Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Bill 2012: Revised Explanatory Memorandum at 1.98, 8.9, 8.10, 8.11, 15.63, 15.64.

<sup>4</sup> Media Release: “Good step to protect an independent NFP voice”, 19/09/2012 - <http://catholicsocialservices.org.au/node/44795>



## **5 Overly prescriptive draft governance standards**

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### **5.1 Introduction**

CSSA considers that not all of the draft governance standards are principles based, which is inconsistent with policy and legislation. We will outline the policy and legislation which require principles based standards, and we will explain why draft governance standards 4, 5 and 6 are not consistent with this approach.

### **5.2 Inconsistent with policy**

- (a) During the development of the ACNC Act, significant efforts were made to address concerns that the draft governance standards would be overly prescriptive.
- (b) Both the explanatory memorandum and the supplementary explanatory memorandum to the ACNC Act reflect an intention by the Government to address those concerns and ensure that the governance standards be principles based. Both the explanatory memorandum and the supplementary memorandum state words to the effect that “governance standards are expected to generally be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation”.
- (c) It was, therefore, the sector’s expectation that the Government’s very clear intention would be that the governance standards be principles based.
- (d) The governance standards were intended by Government to set a minimum level of behaviour for all entities registered with the ACNC. A review of the supplementary memorandum to the ACNC Act makes it clear that the purpose of the governance standards is to provide guidelines for registered entities with sufficient flexibility for different sized entities to determine how they would comply with the guidelines. It was not intended that the governance standards would include prescriptive directions which reasonably ought to be found in the ACNC Act itself.
- (e) Further, the Government was very clear throughout the process of developing the legislation and establishing the ACNC, that the intention was that the ACNC would have a focus on education and assistance rather than heavy-handed regulation of the sector.

### **5.3 Inconsistent with legislation**

- (a) The ACNC Act provides that the governance standards should not dictate how a charity should achieve its goals. The relevant sections of the ACNC Act are consistent with the policy that governance standards should be principles based and not overly prescriptive.
- (b) Section 45-10(1) of the ACNC Act provides that the regulations may specify standards with which an entity must comply in order to become and remain registered with the ACNC. Whilst the scope of section 45-10(1) is not to be limited by section 45-10(2), section 45-10(2) must provide guidance as to the type of governance standards that the ACNC Act contemplates.
- (c) As set out above, section 45-10(2) of the ACNC Act contemplates that the governance standards would adopt one of three forms. The governance standards may require an entity to achieve certain specified matters by

developing processes, or by amending their governing rules to achieve those matters. Alternatively, governance standards may prescribe specified outcomes, but must limit their guidance on how to achieve those outcomes to principles only.

- (d) The dictionary in the ACNC Act does not define 'specified matters' or 'specified outcomes', but they are clearly two different terms which are intended to have different meanings. The term 'specified matters' is used where the ACNC Act contemplates an entity taking steps to insert standards into its own governing rules or processes. The effect is that if an entity develops a process or inserts a matter into its governing rules, then the entity will have the freedom to determine how to implement that matter and the outcome that will result from it.
- (e) In contrast, the term 'specified outcomes' is used where the governance standard would prescribe the outcome to be achieved. The term 'specified outcomes' is qualified by an explanation that specified outcomes may only be prescribed in governance standards if the relevant governance standard refrains from dictating how that outcome must be achieved, or by limiting the guidance - on how it must be achieved - to principles.
- (f) The ACNC Act provides, therefore, that the governance standards may either prescribe:
  - (i) the matter and leave the entity free to determine the outcome; or
  - (ii) the outcome, but leave the entity largely free to determine how to achieve the outcome.

#### **5.4 Draft Governance Standard 4**

- (a) We discuss below how CSSA considers that draft governance standard 4 is unnecessary, and does not require a separate governance standard as it duplicates the protections provided under governance standard 6.
- (b) In addition to that fact, CSSA believes that draft governance standard 4 is inappropriate because it fails to comply with the policy and legislation.
- (c) As we have outlined above, governance standards must provide guidance as to how the entity must achieve specific outcomes or how it must implement specific processes. The brief and vague wording of draft governance standard 4 fails to achieve either of those goals. The result is that registered entities are left with no certainty as to how the standard may be achieved.
- (d) The more concerning result is that the proposed wording of draft governance standard 4 would give the ACNC powers to be heavy-handed in its investigations of registered entities, and the ACNC would have wide scope to use its own discretion to determine whether a registered entity had failed to comply with governance standard 4. We consider that this is inconsistent with the intention that the ACNC focus on education and assistance.

#### **5.5 Draft Governance Standard 5**

- (a) CSSA considers that draft governance standard 5 is not principles based, and this is inconsistent with both policy and legislation. Draft governance standard 5 prescribes the outcomes that must be achieved, and also specifies how the

entity must achieve the outcomes. It is overly prescriptive and not principles based.

- (b) Draft governance standard 5 requires that registered entities take reasonable steps to ensure that their responsible entities are not disqualified from managing a corporation under the *Corporations Act 2001*. The draft governance standard makes reference to significant sections of Part 2D.6 (Disqualification from managing corporations) of the *Corporations Act 2001*. Those parts of the *Corporations Act 2001* are necessarily prescriptive because they are legislative in nature.
- (c) Draft governance standard 5 also requires the registered entity to take reasonable steps to ensure that its responsible entities are not disqualified, and then requires that the registered entity remove the responsible entity if the responsible entity is disqualified under the *Corporations Act 2001*. Essentially the standard prescribes the outcome, being that a responsible entity must not be disqualified, and it prescribes the process for achieving the outcome. This is a very prescriptive draft governance standard.

## **5.6 Draft Governance Standard 6**

- (a) Draft governance standard 6 is also overly prescriptive and not principles based.
- (b) The basis for draft governance standard 6 is the directors' duties contained in Division 1 from Part 2D.1 of the *Corporations Act 2001*. The sections from the *Corporations Act 2001* are necessarily prescriptive because they are legislative in nature. It is inappropriate, therefore, to incorporate those sections into draft governance standard 6 as they are not principles-based.
- (c) CSSA has other concerns with draft governance standard 6, which are set out in sections 6 and 7 below.

## **6 Unnecessary governance standard 4**

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- 6.1** CSSA considers that draft governance standard 4 is unnecessary and does not require a separate governance standard.
- 6.2** Draft governance standard 4 requires a registered entity to take reasonable steps to manage its financial affairs in a responsible manner. Despite this proposed wording being extremely vague, the requirement that registered entities have their financial affairs managed in a responsible manner is already ensured by both draft governance standard 6, and our proposed governance standard 6 set out below.
- 6.3** The reference in draft governance standard 6 to the equivalent of directors' duties ensures that responsible entities, who are responsible for the financial affairs of a registered entity, will manage that registered entity's financial affairs in a responsible manner. Failure to manage the entity's financial affairs responsibly would constitute a breach of the following duties:
  - (a) the duty to discharge the responsible entity's duties with the degree of care, skill and diligence that a responsible individual would exercise if they were a responsible entity of the registered entity;

- (b) the duty to act in good faith in the best interests of the registered entity, to further the purposes of the registered entity; and
  - (c) the duty to not allow the registered entity to operate while insolvent.
- 6.4** Responsible entities must make all decisions relating to registered entities in a responsible manner. They must have basic financial skills and be able to understand a balance sheet, a profit and loss statement and a budget. The courts have made numerous decisions supporting the fact that directors (or equivalent) must ensure that companies (or equivalent) are operated responsibly and the director's duty extends to the financial affairs of the company (or equivalent).
- 6.5** For example, in the case of ASIC v Healey & Ors [2011] FCA 717 (the Centro case), the Federal Court of Australia held that directors had breached their duty of care and diligence where they had failed to take all reasonable steps to focus and consider for each of themselves individually the content of the financial statements; and to make enquiries of management, the board audit committee or other directors as to proposed statements in the financial statements.
- 6.6** CSSA considers that draft governance standard 4 duplicates the protection that is already provided under draft governance standard 6 (or our proposed governance standard 6).
- 6.7** The object of draft governance standard 4 is to ensure that a registered entity manages its resources responsibly and in a way that effectively furthers its purposes and protects its resources from misuse. The public should receive sufficient confidence from governance standard 6 that charities are responsibly managing their resources, resulting in the effective achievement of their respective purposes and the protection of their resources from misuse.

## **7 Increased burden for charities**

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### **7.1 Introduction**

Despite one of the objects of the ACNC Act being to promote the reduction of unnecessary regulatory obligations on the Australian NFP sector, draft governance standard 6 creates increased obligations for registered entities.

### **7.2 Increased burdens**

- (a) Registered entities which are incorporated associations, for example, will now be required to ensure that their responsible entities comply with the duties listed in draft governance standard 6. In addition, each of those responsible entities will have to personally ensure that they comply with the relevant legislation that governs incorporated associations in their particular State (**Associations Acts**).
- (b) The duties contained in the Associations Acts are very similar to those contained in draft governance standard 6, but the differences are significant enough to require registered entities to have to consult both to ensure compliance.

### 7.3 Examples

- (a) For example, in New South Wales, South Australia, Victoria, the Australian Capital Territory and the Northern Territory, provisions in the respective Associations Acts (based on those in the *Corporations Act 2001*) require committee members to disclose any conflict between their fiduciary duty to act in the best interests of the association, and their personal interest. The Queensland legislation (the *Associations Incorporation Act 1981*), however, does not impose a duty relating to disclosure of conflicts.
- (b) An incorporated association in Victoria will have to ensure that its responsible entity:
  - (i) acts in good faith in the best interests of the charity in order to comply with Draft Governance Standard 6; and
  - (ii) acts in good faith in the best interests of the charity to comply with the *Associations Incorporation Reform Act 2012*.

Draft governance standard 6 requires the office holder to act in good faith and in the best interest of the charity *to further the purposes of the registered entity*. The Associations Act requires the office holder to exercise his or her powers and discharge his or her duties in good faith in the best interests of the association, *and for proper purpose*. The wording of the duty is slightly different in the two instances, and so an incorporated association may have to consult both the Associations Act and the governance standard to ensure that it is complying.

### 7.4 Conclusion

There is already a heavy burden on incorporated associations to comply with the existing numerous laws and regulations that apply to them in the various States. It seems inconsistent with the object of the ACNC Act to reduce regulatory obligations:

- (a) to create an additional obligation for charities to comply with substantially the same duties that they are already required to comply with; and
- (b) which may result in a registered entity undergoing two disciplinary processes (one with the State regulatory authority and one with the ACNC) for the same act of non-compliance.

## 8 Inconsistencies in the application of legislation for different types of entities

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### 8.1 Introduction

The proposed drafting of the governance standards, in conjunction with the ACNC Act and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Transitional Act)*, means that there would be no obligation on responsible entities of companies to comply with directors' duties (or the equivalent). Conversely, as we discussed above, the responsible entities of incorporated associations would be required to comply with the equivalent of directors' duties which are found in the relevant Associations Act in each State/Territory.

## 8.2 Nature of inconsistency

Draft governance standard 6 imposes a duty on registered entities to ensure that responsible entities comply with the equivalent of directors' duties. Draft governance standard 6 imposes no duty on the responsible entity. The Transitional Act then stops the directors' duties in the *Corporations Act 2001* from applying to responsible entities of companies. The result would be that directors of companies, who previously were subject to the *Corporations Act 2001* sanctions including imprisonment, would now only be answerable to the registered entity. The only ramifications of non-compliance for directors of companies (which are charities) would be whatever sanctions the charity may impose, and potentially suspension or removal by the ACNC. This is a very inconsistent approach.

## 8.3 Our concerns

- (a) CSSA expects that the intention was to reduce the potential liability for directors of charities and NFPs to reflect the fact that many responsible entities are volunteers. It is inappropriate, however, to completely remove the potential liability for company directors, whilst the responsible entities of other charities with other structures still have to comply with the equivalent of directors' duties under Associations Acts and the like.
- (b) CSSA submits that the directors' duties from the *Corporations Act 2001* should not be revoked for company directors until such time as the Commonwealth and State Governments have agreed to amend all legislation that imposes the equivalent of directors' duties on the responsible entities of charities. This would then result in identical duties and sanctions for all responsible entities, regardless of the legal structure of the registered entity (be it an incorporated association, trust, co-operative etc).

# 9 Focus on sanctioning registered entities over responsible entities

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## 9.1 Introduction

CSSA considers that the inappropriate drafting of Draft governance standard 6 is due to the fact that the ACNC is relatively powerless without including such a prescriptive governance standard. The ACNC Act itself gives the ACNC no authority to remove responsible entities unless the registered entity breaches a governance standard. This has led to an odd situation where a registered entity must fail in its duty to ensure that its responsible entities behave in a way in which those responsible entities are no longer required to behave under law (i.e. under the *Corporations Act*), before the ACNC can sanction the responsible entities involved.

## 9.2 Our concerns

- (a) CSSA is concerned that a charity which is not at fault could be held responsible for the actions of one director who has engaged in misconduct. We consider that the legislation and regulations should protect the interests of registered entities over the interests of responsible entities. The ACNC Act and the draft governance standards are focussed on the duties and breaches of registered entities rather than responsible entities.

- (b) The duties for charities proposed by draft governance standard 6 potentially increase the burden on registered entities by removing the duty from the responsible entities themselves. If there is no personal liability for responsible entities for failure to comply, then there is less incentive for them to comply. This arguably increases the burden on charities to monitor their responsible entities, and creates a greater risk for the charity that the responsible entity will not comply.

### **9.3 Conclusion**

CSSA considers that inserting the prescriptive draft governance standard 6 is an inappropriate way to effectively address the inadequacies of the ACNC Act, and if the ACNC needs the power to directly sanction (and/or remove) responsible entities, then the ACNC Act should be amended accordingly.

## **10 Inappropriate reliance on the governance standards**

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### **10.1 Introduction**

CSSA is concerned that the ACNC will overly rely on the governance standards for its authority to act under the ACNC Act. The ACNC's ability to remove registered entities and responsible entities appears to be largely based upon the governance standards.

### **10.2 Powers in inappropriate instrument**

- (a) As discussed above, CSSA believes the result is that the ACNC has attempted to introduce prescriptive governance standards for matters which should instead have been contained in the ACNC Act itself.
- (b) For example, draft governance standard 5(4) includes provision for the ACNC to disqualify entities from being responsible entities. This is not a guideline or principle for registered entities; it is a means of empowering the ACNC to take action. This power should be included in the ACNC Act and is inappropriate as a governance standard. The ACNC Act sets out the effects of suspension and removal of responsible entities in Section 100-20 to 100-25. Draft governance standard 5(4) is essentially an effect of suspension, and so it seems inconsistent for draft governance standard 5(4) to not instead be a section of the ACNC Act.

### **10.3 Conclusion**

The ACNC should not attempt to bolster the effectiveness of the ACNC Act at this late stage by creating inappropriate governance standards. The Government has promised principles based governance standards. If the ACNC considers that the ACNC Act provides insufficient authority for the ACNC to act, then the Government should consider amending the ACNC Act.

## **11 Proportional response**

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Sections 45-10(2A) to (4) of the ACNC Act provide that the governance standards may reflect the size and type of the entity. The explanatory memorandum to the ACNC Act supports this position. The prescriptive nature of the draft standards does not provide much scope for different responses from different types of, and different sized, entities.

## **12 Other matters**

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CSSA is also concerned that Draft Governance Standard 5(3)(a) creates the possibility of entities being punished twice for the same offence. This is inconsistent with double jeopardy policies.

## **13 CSSA's proposed changes**

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### **13.1 Introduction**

CSSA considers that the changes listed below would result in more appropriate governance standards that would better achieve the purpose of the ACNC Act.

### **13.2 Draft governance standard 1**

Some organisations may not have a conventional constitution or documentation. This fact should be acknowledged in explanatory material so its officers do not misapply the law to such organisations including various charitable works sponsored by religious entities that operate not necessarily as incorporated entities in their own right but in a more complex religious legal structure.

### **13.3 Draft governance standard 2**

- (a) The notion of accountability to members can carry a different meaning for different organisations. To more appropriately capture and reflect the diversity that exists among charitable and NFP organisations, the wording of Draft Standard 2 should better reflect a relationship to the governing rules applicable to a registered entity.
- (b) CSSA supports the amendments to governance Standard 2, paragraph 2(2) as outlined by the Australian Catholic Bishops Conference in its submission to this consultation process. The ACBC submission recommends that:
  - (i) The standard should be made "Subject to the provisions of a registered entity's governing documents ..."
  - (ii) Note 1 should be amended by deleting "providing for elections for its responsible entities" and inserting instead "providing for elections or appointments for its responsible entities in accordance with its governing rules".
  - (iii) The following should be added at the beginning of note 2: "Responsible entities should be guided by their governing rules in determining what, if any, steps are appropriate."
  - (iv) Also, the "membership" of a religious entity may be open to misinterpretation in the absence of clarification. In this regard, it does not follow that all adherents (or claimed adherents) to a religion necessarily will be members of a religious entity advancing a particular mission of that religion. To provide clarification and certainty and to prevent the potential for a member of the public claiming membership of a religious entity based on a tenuous connection, "member" should be defined as a person who has paid a financial subscription for membership of the entity or who is recorded as a member on a register of members.



#### 13.4 Draft governance standard 3

- (a) A level of ambiguity exists in relation to governance standard 3.
- (b) There is some concern that the effect of the section would seem to be that when a charity is engaged in conduct outside Australia it must comply with Australian law. If it fails to do so, it loses its status as a registered entity.
- (c) There is also some uncertainty as to whether or not standard 3 as drafted is consistent with the external conduct standards set out in the *ACNC Act*.
- (d) CSSA also holds reservations about what constitutes the ACNC having a reasonable belief that an offence has been committed and render the charity in breach of this draft standard.
- (e) If it is not intended that charities and NFPS are to apply Australian law outside the jurisdiction – governance standard 3, as drafted, requires amending.

#### 13.5 Draft governance standard 4

- (a) As we discussed above, CSSA considers that the Responsible Management of financial affairs is already within the scope of good governance duties currently overseen by responsible entities.

#### 13.6 Draft governance standard 5

- (a) CSSA proposes the following wording for governance standard 5:
  - Object:* 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:* A registered entity must ensure that none of its responsible entities are:
    - (i) disqualified from managing a corporation within the meaning of the *Corporations Act 2001*; or
    - (ii) disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity.
- (b) CSSA considers that subsection 4 of draft governance standard 5 should be removed (or included in the ACNC Act). It is inappropriate as part of a governance standard.

#### 13.7 Draft governance standard 6

- (a) The prescriptive wording in draft governance standard 6 should be in legislation. The wording should remain in the *Corporations Act 2001* until such time as the State and Federal Governments agree to amend all relevant legislation that has the potential to duplicate the obligations for charities under the ACNC Act.
- (b) CSSA proposes the following wording for draft governance standard 6:
  - Object:* The object of this governance standard is to give the public, including members, donors, employees, volunteers and benefit recipients of a

registered entity, confidence that the responsible entities of the registered entity are complying with good governance duties.

*Standard:* The registered entity must take reasonable steps to ensure that its responsible entities do not engage in conduct which is inconsistent with:

- (i) an Australian law prescribing the equivalent of the general duties found in Division 1, Chapter 2D.1, Part 1 of the *Corporations Act 2001*;
- (ii) where that Australian law requires compliance by that responsible entity.

## **14 Conclusion**

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- 14.1** CSSA has long been a supporter of reform in the NFP in the sector. A key element of this support has been an assurance by the Government and the ACNC that it is intent on ensuring that the sector is recognised and respected for its diversity and that both the Government and the ACNC support the continuing growth and development of the NFP sector. CSSA's submission attempts to balance the regulatory function of the ACNC and these principles.
- 14.2** CSSA also confirms the verbal acknowledgement from the ACNC and government officials that the introduction of these proposed governance standards will increase the administrative burden on organisations.
- 14.3** To offset the impact of these measures CSSA:
- (a) would like to see the Federal Government uphold its commitment to reducing the red-tape and administration burden incumbent on the NFP sector. We believe there is positive scope for this to be achieved through the timely establishment of the Charity Passport.
  - (b) Would like to see greater collaboration across State and Territory Governments with the aim of reducing unnecessary red tape and cost to the sector.
  - (c) Would welcome the introduction of 'anti-gag' clause legislation into Parliament before the end of June this year.