
Response to the Consultation Paper on the Development of Governance Standards

Prepared by BoysTown



BoysTown

Fresh start.
New hope.

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Introduction

This is BoysTown's response to the consultation paper on the *Development of governance standards* issued by the Commonwealth Treasury.

About BoysTown

BoysTown is a national organisation and registered charity, which specialises in helping disadvantaged young people and families who are at risk of social exclusion. Established in 1961, BoysTown's mission *is to enable young people, especially those who are marginalised and without voice, to improve their quality of life*. BoysTown is constituted as a Public Company Limited by Guarantee. Our organisation has its own independent income derived from an active and national fundraising program including the BoysTown Art Union, corporate sponsorships, work place giving programs, donations and bequests. Approximately 70% of BoysTown's income is derived from this fundraising program with the remainder being comprised of Commonwealth and State grants and fee for service activities.

BoysTown focuses on the provision of services to the most disadvantaged children and young people in Australia particularly in response to 'gaps' in existing service provision. For instance, BoysTown provides Australia's only 24/7 child and adolescent telephone and online counselling service, Kids Helpline. BoysTown also provides Parentline, a telephone and online counselling service to parents and carers in Queensland and the Northern Territory. Crisis and short-term accommodation services are offered to homeless families and to women leaving situations of domestic violence. Furthermore, BoysTown delivers vocational training, transition from school to work, education reengagement and labour market programs in Queensland, New South Wales, South Australia and Western Australia.

General Response

In January 2012, BoysTown provided a response to the earlier consultation paper on the *Review of not-for-profit governance arrangements*. The issues raised in our earlier response are still relevant in considering the current consultation paper.

The Commonwealth Government is on the public record as stating that the rationale for the reform of the Not-for-Profit (NFP) sector is to both improve public confidence and enhance the sector's efficiency through the reduction of 'red tape'. It is recognised that the task facing the Commonwealth Government in the setting of governance standards is challenging. These standards in time will provide a governance framework for a diverse range of entities; both large incorporated organisations as well as volunteer associations. Consequently in response to this complexity it appears that the consultation paper is proposing a 'lowest common denominator' approach as evidenced by the proposed governance standards being set at a most basic level. BoysTown believes that this approach has challenges for the following reasons:

1. Governance standards cannot be finalised when there continues to be no framework in place between Commonwealth and State and Territory Governments concerning harmonisation and or standardisation of existing legislation and regulations directing the NFP sector.

As stated in our first response NFP organisations, particularly those operating at a national level need to meet a range of overlapping and duplicative Government regulatory and reporting systems linked to governance and service delivery. Our response provided specific examples as reflected in this quote:

The following legislative, policy and evaluation frameworks will need to be harmonised before an effective National regulator of NFP organisations can be established:

- a) *Commonwealth and State Incorporation Acts*
- b) *Fundraising legislation – see discussion above*
- c) *Financial Reporting Standards*
- d) *Contractual reporting standards across Commonwealth and State funding bodies. It should be noted that these standards may vary between Departments within the same jurisdictions*
- e) *Standards relating to governance and service delivery. State Governments are introducing standards which organisations are required to meet to be eligible for funding. For example NFPs in Queensland will need to be compliant with the Standards for Community Services to be eligible for continued and new funding from the Department of Communities and other Queensland Government Departments funding social and educational services. Unless these types of standards are harmonised across Australia there is a risk that the introduction of a National regulator may lead to the introduction of another set of new and/or contradictory standards in relation to governance and service delivery.*

The situation outlined above unfortunately remains current. Although it is acknowledged that some steps have been taken recently to commence a dialogue with the States and Territories regarding this issue i.e. the release of the Council of Australian Government's 'Regulatory Impact Assessment of Potential Duplication of Governance and Reporting Standards for Charities' it appears that agreement between Governments as to a common strategy to resolve this matter is still to be reached. Consequently if one of the stated purposes of this reform process, the cutting of 'red tape', is to be effectively achieved then a harmonised/standardised framework needs to be in place prior to the implementation of new governance standards. As stated in our earlier response, the 'ACNC would be better placed to focus on leading national legislative reform to harmonise or standardise existing Commonwealth and State legislation, regulation and reporting standards rather than the development of a duplicative set of standards relating to corporate governance.'

2. There continues to be no nationally consistent definition of what is a 'Charity'.

This issue particularly relates to Draft Standard 1 in the new Consultation paper. The background to this issue has been well outlined in Treasury's previous discussion paper on Introducing a Statutory Definition of 'Charity'. This policy issue remains unresolved. It is our view that the development of consistent governance standards is compromised by the absence of any consistent definition for a 'Charity'.

3. The 'lowest common denominator' to the setting of governance standards is unlikely to increase public confidence in the sector.

Over the last decade, the NFP sector has placed considerable importance on improving corporate governance. BoysTown believes that the governance standards being proposed in the discussion paper are incomplete when compared to the current governance practice of NFP organisations. For example, the standards are silent in relation to key governance practices already being implemented in some NFP organisations relating to strategic and business planning, policy development, organisational monitoring of performance, risk management and Board evaluation. It is therefore difficult to perceive, that setting governance standards at a lower level than current practice would bolster public confidence in the sector.

In conclusion, BoysTown's concern about the NFP reform is that it is by necessity a piecemeal and disjointed process as the legislative and policy underpinnings for this strategy are not in place. Consistent with our responses to earlier consultation papers our position remains that Treasury and now the ACNC need to lead reform that focuses on the harmonisation and or standardisation of existing Commonwealth, State and Territory legislation and regulation impacting on the operations of NFP organisations as well as the introduction of a national definition of charity for real and effective reform to occur.

Specific Comment on the Draft Standards

Draft Governance Standard 1: Purposes and NFP Character of a Charity

The objective of the draft standard is to provide a clear statement as to the NFP organisation's purpose and to provide stakeholders with assurance that its operations are linked to purpose. The standard could be strengthened by including other strategies commonly used by NFP organisations to prevent 'mission creep' i.e. strategic plans prepared and endorsed by the Board and performance reporting against purpose.

The standard also makes the NFP organisation responsible to comply with the '*character*' of a NFP entity without any attempt being made to define the concept. The term '*character*' is an ambiguous one that could provide the ACNC with an open cheque to commence the standardisation of NFP operations. This would appear to be contrary to the intent of the standards being a set of principles, which could be flexibly applied by NFP entities to meet their various operational requirements. This term subsequently should be deleted or at least be defined.

Previous comment has already been made regarding the limitations involved in introducing governance standards in the absence of a consistent national definition of 'Charity'. Consequently this standard should only be drafted once the legal framework has been clarified.

Draft Governance Standard 2: Accountability to Members

The value this standard adds to the governance of NFP organisations is questionable given the current legal responsibilities of Board members. Furthermore, NFP entities have a wider range of accountability. For example, NFP organisations recognise the need to implement processes ensuring its accountability to clients, donors and supporters who provide financial support and volunteers essential to the operations of many services.

A statement regarding this broader level of accountability needs to be incorporated in the Standard.

Draft Governance Standard 3: Compliance with Australian Laws

The need for this draft standard is questioned. It seems incongruent that there is a need to have a regulatory governance standard that requires legal compliance when the laws themselves require compliance. Charities generally have a strong moral and values base which already self-regulates behaviour. Withdrawal of this standard is recommended.

However if the standard is retained then there is a need to amend it. Draft standard 3 (2) provides that 'A registered entity must not engage in conduct, or omit to engage in conduct, that **May** be ..{a serious offence}. The commentary says that the 'registered charity does not need to be actually charged with an indictable offence, or given a penalty of 60 penalty units or greater, to be in breach of this draft standard. For example, if the ACNC reasonably believes a charity has engaged in an offence of fraud, the charity would be in breach of the governance standards and the ACNC could take action. This is in breach of the usual assumption of 'innocent unless proven guilty'. The ACNC needs only to come to a view that there MAY be non-compliance with a law before taking action against the entity. The regulator is in this case also the judge. The '**may**' should be changed to '**is**', so that the ACNC can only take action in respect of the standard only after it has been determined by a court that a crime has been proven.

Draft Governance Standard 4: Responsible Management of Financial Affairs

Accepted, however comments regarding 'lowest common denominator' apply.

Draft Governance Standard 5: Suitability of Responsible Entities

Although in agreement with the intent of the draft standard, it is our view that it has been written in a very prescriptive manner, inconsistent with a principle based approach.

The standard needs to be redrafted. At the very least subsection 4 and subdivision 45-D need to be removed, as they are incompatible with a principle-based approach. If the ACNC believes it requires these powers then it would be more appropriately placed in the parent legislation.

Draft Governance Standard 6: Duties of Responsible Entities

It is our analysis that under this draft standard and other changes to be introduced by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* that responsibility for the conduct of responsible entities (Directors of Companies) will rest with the charity. It appears that these proposals will rescind any individual penalties for inappropriate conduct that Directors are now subject to with respect to the Corporations Act 2001. It is our view that in practice this introduces ambiguity in the accountability of Directors and is contrary to the stated purpose of these reforms. The personal liabilities of Directors, as currently contained in the *Corporations Act*, needs to be maintained.

Conclusion

It is our view that the NFP reform process is structurally flawed due to the absence of harmonisation and or standardisation in Commonwealth, State and

Territory legislation and regulations impacting on NFP entities particularly those operating at a national level. Furthermore the taking of a 'lowest denominator' approach to the preparation of these draft governance standards appears to be contrary to the Commonwealth Government's stated purpose of the reform process concerning raising public confidence and enabling NFP organisations to be more efficient through the reduction of 'red tap'. Although it appears that despite these serious flaws that the current approach to the reform process will be maintained, we further submit that any 'Rules' and 'Codes of Conduct' developed to give effect to the final set of governance standards will be introduced only after extensive consultation with the NFP sector.