

**WACOSS submission to the Australian Charities and
Not-for-Profit Commission Consultation Paper
on Draft Governance Standards**



wacoss

Western Australian
Council of Social Service Inc

*Ways to make
a difference*

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WACOSS submission in response to ACNC consultation papers on the development of draft governance standards

About WACOSS

The Western Australian Council of Social Service (the Council) is the leading peak organisation for the community services sector, and represents 300 member organisations and individuals and over 800 organisations involved in the provision of services to individuals, families and children in the community.

The Council is part of a national network consisting of the State and Territory Councils of Social Service and the Australian Council of Social Service (ACOSS). Our national coverage strengthens our capacity to represent the interests of people in Western Australia across the breadth of state and national agendas.

Each year the Council's member organisations deliver services to hundreds of thousands of Western Australians. The services our members provide include health, community services and development, disability. Employment and training, aged and community care, family support, children and youth services, mental health and drug and alcohol treatment, indigenous affairs, support for culturally and linguistically diverse people, victims of violence and abuse, housing and advocacy.

The Western Australian Council of Social Service speaks with and for Western Australians who use community services, to bring their voices and interests to the attention of government, decision makers, media and the wider community.

SUBMISSION

The Australian Charities and Not-for-Profits Commission (ACNC) has released a consultation paper on the development of governance standards for charitable entities registered with the ACNC. The consultation paper outlines draft standards for regulation of registered charities and approaches to the administration of the standards. The Council notes and supports the two core principles underpinning the standards: (a) reduction of the administrative burden; and (b) adoption of a principles-based approach towards regulation. The Council's response to the draft standards is framed around the extent to which the proposed standards comply with these two core principles in the context of considerations of the sustainability of the sector and its effectiveness in delivering community outcomes, as outlined below.

The Council welcomes this opportunity to have input into the development of the draft governance standards. However, the Council has strong reservations about the timing and sequencing of the Federal Government's reform agenda, and its ability to consult fully and provide a considered response within the short timeframe of the consultation.

In preparing its submission, the Council has consulted with a cross-section of its membership to obtain a community perspective on the draft governance standards. Their concerns and comments are represented in this submission.

The timing and sequencing of reforms

While the Council acknowledges the commitment of the Federal Government to deliver a series of reforms concerning the charitable and not for profit sector, including a statutory definition of charity, reducing the administrative and reporting burden, and charities tax reforms within this term of Government, we note that, despite supporting and having advocated for these reforms for many years, the sector has consistently expressed concerns with the pace of these reforms, and the adequacy of the consultation process.

The Council considers it inappropriate for such important and wide-ranging reforms to the governance and operations of the charitable and community sector to be subject to an inadequate and time-constrained consultation process. The timing and sequencing of the reforms has restricted our ability to be able to respond adequately to these reforms within the limits of existing sector policy capacity.

The community sector has entered into the consultation process with the government on this series of reforms in good faith and has at all points sought to progress the agenda as inclusively and effectively as possible. We have at times been impeded in our efforts to do so by a selective approach to consultation by government, confidentiality requirements, delays in the presentation of discussion papers and exposure drafts, and a substantial disconnect between the policies and principles discussed and agreed with Ministers and the ACNC taskforce, as compared to the substance and the significant over-reach of the measures presented within subsequent exposure drafts of the legislation and regulations. We do not believe that the planning and coordination of these reforms or the consultation process reflect the principles and commitments for how the sector and government should work together embodied in the National Compact.

While it is true the sector has been advocating for substantive reforms in these areas, the sequencing and priority assigned to the elements of the reform agenda clearly reflect the priorities and concerns of government and not the sector. Our biggest priorities remain the reduction of the burden of onerous and inappropriate reporting requirements, clarifying and strengthening the manner in which charity is defined in the statutes, and achieving greater harmonisation between Federal and State/Territory jurisdictions. The Council had previously argued for harmonisation of the different regulatory frameworks before commencement of the ACNC regulation and is deeply concerned about the increased compliance burden on a sector overwrought with accountability, administration and reporting. The timing and sequencing of the commencement of the ACNC regulation of charitable entities in particular has created an increased administrative burden for the sector, which now has to contend with and report through two regulatory frameworks, national and state (as discussed further below).

The COAG Regulatory Impact Assessment articulates the problem of the compliance burden of regulatory duplication, and the need to align and harmonise different state and territory regulatory frameworks with the ACNC to minimise regulatory compliance costs. A central issue in regulatory duplication and increased administrative burden and cost is the timing and sequencing of the reforms. The haste in operationalising the ACNC before settling the need to harmonise different regulatory frameworks has become a major source of increased administration and compliance costs for the charitable sector.

The COAG Regulatory Impact Assessment is out of sequence with the timing of the not-for-profit sector reform agenda. In addressing the issue of harmonisation, the not-for-profit sector and government would have been better served if the impact assessment had been conducted before establishment of the ACNC.

Recognition of the independence and contribution of the sector

The Australian Council of Social Service (ACOSS) has made a submission to the ACNC in response to the consultation papers on draft governance standards. Together with ACOSS, The Council and many of its members have been advocates for national reforms to improve sector regulation, eliminate unnecessary administrative, reporting and compliance, harmonise Federal and State regulations and support the transparency and accountability of the sector.

In particular, the Council strongly endorses the ACOSS comments, concerns and analysis relating to the primacy of the independence of the sector as its defining characteristic, and of the need for the core focus upon the effectiveness of community sector in delivering services to assist and support the people and communities who rely upon them.

The ultimate test of the ACNC's activities and regulations will be whether they support and assist the sector in delivering better outcomes for disadvantaged and vulnerable Australians, from our youngest to our oldest citizens. We believe it is critical that ACNC Regulations concerning governance standards focus on the key Objects of the *ACNC Act* – to ensure a robust and independent charitable and NFP sector, to reduce the compliance burden through a light regulatory touch, and ensure that community organisations are true to their mission and transparently and effectively deliver their objectives.

The Council is also aware of submissions made by some of our member organisations and has indicated in response to some particular governance standards where we endorse their comments below. In particular, we support the comments by Uniting Care Australia and Catholic Social Services Australia on the importance of the Objects of the Act, the independence of the sector, the need to progress red-tape reduction as well as their concerns with the timing, sequencing and relative priority of the reform measures.

The Council believes that further work is needed on the governance standards to deliver on the commitment that these standards will be principle-based and to ensure they embody the objects of the *ACNC Act*. We are concerned that more work is required to ensure that the implementation of these standards does not result in an increased imposition of red tape upon the sector and, crucially, does not undermine the independence of a diverse not-for-profit community sector.

To achieve these outcomes we believe that it is also important that the Commonwealth Government addresses some of the sequencing issues of these reforms and progresses (in partnership with the sector and the ACNC) some of the key measures that will protect sector independence (such as proposed legislation to prevent 'gag' clauses), advance red-tape reduction (such as new Commonwealth Grant Guidelines and the ACNC charities 'passport'), and progress harmonisation with State and Territory legislation (such as the COAG RIA).

Reducing the administrative burden

There is a clear consensus among the Council's members that fundamental to an effective regulatory framework is a significant reduction of the administrative burden carried by charitable entities. The sector in general accepts the need for a regulatory framework for charities, but would only support regulation that is reasonable and not burdensome, punitive or unnecessarily complex.

In response to the ACNC consultation papers, representative bodies of charitable organisations have reported that many of their members are apprehensive about their ability to properly comply with the standards required by the ACNC regulatory framework. Most of these charities comprise volunteers and / or staff members who lack the resources, expertise or knowledge to satisfy (or know if they are satisfying) the requirements of the proposed standards.

Further, registered charities are now faced with the regulatory burden of dual reporting systems: the ACNC and State regulatory authorities. The existence of parallel regulatory systems defeats the ACNC's central aim of reducing the administrative burden; instead, it increases compliance and injects confusion into the reporting obligations of the sector.

It is clear that the introduction of a new national regulator and regulatory framework must necessarily result in new regulatory processes, and that it is inevitable that this will, at very least in the short term, increase the administrative and compliance burden on many charities. Under these circumstances, a reform process that is truly focused on the best interests of service users and the community, as well as the viability and sustainability of charities and service providers should be looking to do one of two things – either put in place measures to reduce the compliance burden on charities prior to implementing the reforms or provide sufficient resources and support to ameliorate the increased compliance burden.

Clearly, in the face of such significant changes, the charitable sector needs to be supported to comply with the ACNC's regulatory requirements through some form of industry adjustment package. The consequences of an approach that does not include an industry adjustment package to build capacity and support compliance; sufficient independent support and advice for affected charities to call on; additional funding for affected organisations to meet the compliance burden; or progress on cross-jurisdictional harmonisation or Commonwealth grant compliance – is that there is a significant impost on the capacity of charitable organisations that could lead to those who lack the capacity to deal with these complexities (particular smaller charities and service providers, or medium sized ones facing a significant increase in their administrative requirements) may struggle to meet their new obligations and maintain the viability of their organisations.

Until there is regulatory convergence of the different Commonwealth and State systems, charitable organisations are likely to struggle with two reporting regimes and an increased compliance burden. The prospect of dual reporting for the sector represents a failure to appreciate the heavy administrative burden already weighing on charities. Many are required to respond to multiple government systems of reporting and accountability, especially those charities that receive government funding. For the smaller charities, the growing administration and compliance burden cuts deeply into their sustainability as viable organisations.

The Council appreciates that there is a political imperative to progress the ACNC regulations during this term of Government, and that the timeframe between the passage of the *ACNC Act* and a Federal election on September 14th has led to compressed timeframes and overlapping consultation processes. Nevertheless we remain concerned that the progress has been according to Treasury's priorities and that the consequence for the sector appears to be an increasing regulatory burden, together with a risk that those reforms needed to improve harmonisation and reduce the administrative burden will not be progressed within this term of government. As articulated in the Council's previous submission on the ACNC legislation, the Council would have preferred deferment of the introduction of the ACNC regulatory framework until there is a convergence of national and state regulatory systems.

The Council is concerned that the proposed ACNC regulatory framework will particularly disadvantage the smaller charities, which constitute the bulk of ACNC registered charities. While we appreciate that a tiered approach has been taken to the reporting requirements for small, medium and large organisations, we remain concerned that, taken together with a number of other pressures currently experienced by smaller organisations, an unintended consequence of these reforms could be a reduction in the number of smaller organisations and a loss of diversity within the sector. This is why we believe that more support needs to be provided to smaller organisations to enable them to develop or access the capacity they need to embrace these and other reforms.

Recommendation: The Council recommends that the ACNC provides an industry adjustment package whereby registered charities can obtain individual advice and assistance in complying with ACNC governance standards.

Principles-based approach to reporting

The Council welcomes the commitment to a principles-based approach to reporting with its promise of compliance flexibility and the potential for reduced administration. The focus on outcomes rather than the mechanisms of input is a critical element of the regulatory framework that, if correctly applied and administered in the governance standards, has the potential to reduce the administrative burden of complying with the regulations.

The Council is concerned however, that a number of the proposed governance standards do not appear to be principles-based and are overly prescriptive and confusing. In particular, The Council is concerned that proposed standards 4, 5 & 6, which relate to financial management and the suitability and duties of 'responsible entities,' do not appear to be principles-based and are overly prescriptive and the stated objects of these proposed standards do not seem to match or lead to the standards as proposed.

The Council has in previous submissions expressed qualified support for the ACNC based on its independence as a regulatory body, flexibility in the regulation of governance standards, and a focus that emphasises education, guidance and support over prescription. Subscription to these principles should be a core purpose of a principles-based approach to regulation, but the prescriptive nature of the draft standards contradicts this purpose.

Recommendation: The Council recommends that the draft standards be amended to better reflect the ACNC's stated aim of a principles-based approach to regulation.

Plain and unambiguous language

The proposed governance standards are couched in a legalistic language that appears derive from corporate law and is alien to the charitable and not-for-profit sector. While it is clear that the governance standards are seeking to use the specific terminology already contained within the *ACNC Act*, it would be helpful to have plain language explanations provided alongside (for instance, *charitable organisation* for ‘registered entity’ or *a person deemed responsible in your governance documents, such as a Board member* alongside ‘responsible entity’)

On this point, many of the smaller community organisations are run by volunteers who often do not have the legal or accounting backgrounds to appreciate the full meaning and intent of ‘legalistic’ language; they would prefer simplicity in the wording of standards to enable effective compliance.

Recommendation: The Council recommends that the standards are written in or where necessary accompanied by plain and unambiguous language that is clear and precise in meaning and intent.

Recognition of the independence and contribution of the sector

The Council supports the ACOSS ‘principles for effective sector regulation’ articulated in the ACOSS submission in response to the ACNC draft governance standards. The ACOSS ‘principles for effective sector regulation’ underline the independence and contributions of the charitable and not-for-profit sector and establish a framework for assessing and monitoring sector reform and regulation.

The ACOSS submission draws attention to the lack of reference in the ACNC consultation papers about the independence and contributions of the sector. The Council is equally concerned about this absence and considers that reference to the independence and contributions of the sector should be a hallmark of any sector regulation. As stated in the ACOSS, ‘the independence of the charitable and not-for-profit sector is a central principle that regulatory frameworks, including governance principles, must recognise and support.’

Recommendation: The Council recommends the recognition of the independence of the sector and its contributions towards the betterment of civil society in Standard 1 and as a central principle of the ACNC regulatory framework.

Draft governance standards

Draft governance standard 1: Purposes and NFP character of a charity

As mentioned above, this standard would have benefitted from the inclusion of the recognition of the independence and contributions of the charitable and not-for profit sector, and the diversity of its constituents. This would be an important inclusion linking the Object of this standard to the Objects of the *ACNC Act* in the standard that would inform the public about the structure and work of the sector, and advance a crucial principle in government contracting of the sector’s independent advocacy role of representing the needs and interests of vulnerable and disadvantaged people.

The defining characteristic of charities and not for profit organisations is that they are mission driven – that they have a clear and over-riding purpose for their existence and activities. In this context we believe that the Object of this Standard (with the above considerations concerning the Objects of

the ACNC Act taken into account) to ensure and entity is acting to further its mission or purpose meet the test of being proper, principle based objects.

One crucial gap in the ACNC Act that hampers efforts to introduce governance standards that relate to ‘the charitable purpose’ and ‘the not for profit character’ of a registered entity is that we do not have a clear definition of not-for-profit within the Act or the governance standards, and the work regarding modernising and creating a statutory definition of charity has yet to happen.

The Council notes that the COAG Regulatory Impact Assessment (RIA) suggest that this new governance standard has the potential to add to compliance costs. We agree with Uniting Care Australia submission, where it suggests that this is not necessarily the case if there is a commitment within the governance standard to recognise and accept existing documentation of mission and purpose, and to only seek addition information (based on standard reporting templates)where existing governance materials do not sufficiently articulate mission and NFP character.

Recommendation: Include reference to the Objects of the ACNC Act; introduce an agreed definition of ‘not-for-profit’, accept existing governance documents for the purposes of this standard unless they do not sufficiently make clear an organisations’ charitable purpose and NFP character.

Draft governance standard 2: Accountability to members

The Council supports the principle of ensuring charitable organisations are accountable to their members. We note however that the diversity of governance arrangements and organisational structures within the charitable and NFP sector means that in practice ‘accountability to members’ can mean a range of different things. In this context it would appear there are two clear principles here – that the governing documents (such as the constitution) of an organisation needs to clearly specify who that organisation is accountable to, and the means by which it ensures it can be and is held to account.

To better reflect the diversity of the sector therefore the drafting of governance standard 2 should focus on the extent to which the governing rules of a registered entity (i.e. a charity) are effective in ensuring accountability to members, and the extent to which the actions of the responsible entities (such as board members) within that entity (organisation) are consistent with those governing rules in ensuring accountability to members. That is, the focus of the governance standard has to be on the relationship between the governing rules and organisational behaviours.

Recommendation: The Council supports the inclusion of this standard but recommends that the standard is redrafted to better allow for the diversity of organisational structures and focuses on the extent to which existing governance documents ensure accountability to members and the manner in which ongoing organisational behaviour is consistent with those accountability mechanisms.

Draft governance standard 3: Compliance with Australian laws

The Council is not convinced by the need to include Compliance with Australian Law as a governance standard. It is unclear what the intent of the inclusion of this standard is, and what, if anything, it adds to the existing compliance powers of the ACNC under the ACNC Act. It is clear that registered entities already have an obligation to comply with Australian Laws – and those Laws already have

their own enforcement, so it is unclear to what extent this represents a duplication of existing obligations and powers.

As currently drafted, the proposed governance standard could be read as suggesting that an organisation could be in contravention of the standards and potentially breached if indicted for an offence - rather than actually requiring a determination it has in fact broken the law.

The Object of this standard does not seem to explain why it is here or what its actual intention is – merely referring to ensuring public trust and confidence that a registered entity is acting legally. As it stands this standard does not meet the test of being principles-based.

It may in fact be that the intention of this standard is to give the ACNC additional powers to investigate a charity if it is thought to have breached the law and/or to position the ACNC to either supplant other enforcement bodies or to be proactive in undertaking initial investigations and referring them on to other authorities when it determines grounds exist. Is the ACNC for instance looking to replace the role of ASIC in investigating charities that are also under the companies act for breaches of company law?

If this is the intention (and it is by no means clear) then we would argue that such investigative powers need to be contained within the *ACNC Act* itself, not the governance standards. In either case we believe that on the face of it this Standard is inappropriate and/or unnecessary.

We note that the consultation paper suggests that the purpose of the proposed standard is to “enable the ACNC to take appropriate regulatory action” and that its object is “to ensure ongoing compliance”. The Council believes that it is inappropriate to be using the governance standards to extend either the regulatory and enforcement powers of the ACNC or to extend the scope of their coverage. We believe the existing investigative and enforcement powers within the *ACNC Act* are already sufficient to enable the ACNC to act on breaches of the *ACNC Act*.

If Treasury believes these powers or their scope are not sufficient, then it is our opinion that they need to make the case for extending those powers, and need to pursue those changes as amendments to the act, not within principle-based governance standards.

Recommendation: This standard should be removed. The intent of this standard should be clarified and the principle on which it is based articulated, and then further consultation undertaken with the sector.

(This should not delay progress of the other standards but be introduced separately at a later date).

Draft governance standard 4: Responsible management of financial affairs

The Council believes that responsible financial management is crucial to good governance of charitable and not-for-profit organisations. This is why the Council has consistently put time and resources into financial management education and training for its members during its 50 years of operation. The Board and management of a charity have a duty and obligation to ensure sound financial management. The majority of charitable organisations would be expected to already have financial systems in place and act responsibly in the management of their financial affairs. They

customarily have annual financial audits, which is a usual requirement of those charities that receive government funding.

However, The Council agrees with Uniting Care and Catholic Social Services on the point that it is inappropriate to separate out sound financial management from the other integral aspects of sound organisational governance, and does not think that it should be considered a governance standard in its own right.

The stated Object of this governance standard does not adequately capture either the principles involved, nor make clear the intent of these measures. It may be that the intention of Treasury in proposing this draft standard is to ensure that, while the financial reporting standards specify the kind of information that must be reported on to maintain financial accountability, the intent of the governance standard is to ensure that a charity has in place the appropriate financial systems (including roles and responsibilities). If this is the case, then it should be made explicit in the objects of this governance standard. Even if this is the case, we believe that this should still be considered as part of rather than separate to other aspects of good corporate governance.

We also note that charitable organisations have varying capabilities to manage their financial systems, depending on their size and resource capacity. Smaller charities are likely to have much less internal access to financial expertise, and externally acquired expertise is expensive for cash strapped charities. The regulation of standards relating to financial management should therefore be flexible in accommodating these varying financial capacities in accordance with a principles-based approach.

Recommendation: The Council recommends that responsible management of financial affairs should be considered within the scope of good governance activities and not embodied in a separate governance standard. Any standard relating to financial management should also adopt a principles-based approach to the regulation of responsible financial management in recognition of the reduced capacity of the smaller charities to comply with the full rigours of financial reporting.

Draft governance standard 5: Suitability of responsible entities

The Council is concerned that the proposed governance standard 5 is not principles-based and is overly prescriptive. The wording of the standard appears to derive from the Corporations Act and makes reference to significant sections of that Act in relation to disqualification from managing a corporation.

For an organisation that is already subject to the Corporations Act (as a constitutional corporation or a company limited by guarantee) these obligations already exist and it is inappropriate to duplicate them here. For other charitable organisations, such as those that are incorporated associations under a State or Territory Act these prescriptions may result either in regulatory duplication or in inconsistencies with their existing obligations.

It may be that the intention of this governance standard is to enable the ACNC to be able to supplant the role of ASIC in relation to corporations who are also charities – if that is the case then it should be made explicit, and the changes proposed as amendments to the Act not governance standards. Similarly it may be the intent to duplicate State and Territory responsibilities so that States and

Territories might be persuaded to refer their powers (as South Australia has indicated an intention to do). If this is the case we think it would be more appropriate to pursue the harmonisation agenda through COAG and seek agreements with the States, and then to bring forward amendments to the *ACNC Act*.

Recommendation: The Council regards draft governance standard 5 to be overly prescriptive, not principles-based and unnecessary. We recommend that the standard be dropped.

Draft governance standard 6: Duties of responsible entities

Similar to draft standard 5 above, this standard is not principles-based and is overly prescriptive. It borrows heavily from the Corporations Act and its requirements are alien to the many charities that are currently not subject in law to all of the provisions contained in the standard. These charities would have to implement additional compliance procedures to satisfy the provisions of the standard and here again there is a further increase in the administrative burden.

The Council shares the concern expressed by Catholic Social Services that this standard in particular (as well as to an extent standard 5) focus on sanctioning registered entities (i.e. Charities) over responsible entities (e.g. Board members). This arises to the extent that the existing powers of the ACNC under the Act are focused on registered entities (i.e. organisations) and not responsible entities (individuals). It creates a situation where there is significant risk to a charitable organisation of it being breached, and its credibility and ongoing viability put into jeopardy by the actions or misconduct of an individual director or board member. The Council believes that this is contrary to the intended role of the ACNC, and that its focus and responsibility should be to safeguard the interests of charities (and through them the community) over the actions of individual directors or board members.

The duties for charities arising from the proposed governance standard are likely to significantly increase both the administrative burden and level of risk for charitable organisations, by effectively removing the duty from the responsible entities (directors or board members) themselves. It also increases the obligation on charities to monitor their directors and board members to no apparent gain.

Recommendation: The proposed governance standard 6 is not principles-based, is overly prescriptive, and increases both the risk and the burden of charitable organisations to no gain. The Council considers it is unnecessary and should be dropped.