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Submission to the

Review of not-for-profit
governance arrangements

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www.anglicare.asn.au

The Manager
Philanthropy & Exemptions Unit
Personal & Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600
NFPReform@treasury.gov.au

Background

Anglicare Australia is a network of 43 member agencies across Australia. These members together support one in forty Australians of all ages, operate 1,545 sites, employ over 31,000 staff and volunteers and have a combined budget of over a billion dollars. They have a diversity of size and service offering and are present in every type of community across Australia. They have been supporting their communities for over 150 years and are deeply embedded in the communities which they serve.

Anglicare Australia members have a variety of governance and organisational structures typically as either Incorporated Associations or as Companies limited by guarantee.

Membership of Anglicare Australia is conditional, requiring members to (amongst others requirements) *“operate at the highest and most transparent level of governance and financial stewardship”* (Anglicare Australia Code of Ethics).

General points and discussion

In general Anglicare Australia welcomes the move to initiate a principles based approach across the NFP sector. We support the sector having strong accountability and transparency through, amongst other things, good governance. The Productivity Commission Report into the Contribution of the NFP Sector found that the community has a large had a high degree of trust in the sector and strong governance will support that. This trust does not seem to be acknowledged through some of the language in the consultation paper but more especially in the Exposure Draft of the ACNC Bill.

While all Anglicare members have strong governance regimes and the small ones can be supported by larger ones in this respect if necessary; many other small agencies, especially those unaffiliated with a major network, may struggle to make the changes. It should be noted also that their voices may not be heard in the consultation process as they may not have the resources to form a submission, or may not even know that this will affect them. We believe that one of the strengths of the NFP sector is its diversity, and feel that anything that undermines that diversity should not be supported.

In putting the spotlight upon the governance of the NFP sector it should not be assumed that good governance is not already present. Most Anglicare members have sophisticated governance regimes overseeing their complex businesses. Governance is already a conscious area of effort and intent for all Anglicare members and so a major concern with the implementation of any new system is avoiding duplication and further red tape.

It is imperative that in introducing any new structures Commonwealth agencies surrender the areas in their funding agreements that are duplicated by the new measures and system.

With the introduction of any new system implementation and movement across to the new system is always an area of concern. The interim position here must be that the onus is on the ACNC to prove that there are differences in governance standards where the entity continues to follow its previous regime with an accepted alternative governance body. It should not be on the organisation to prove how its previously accepted regime now fits.

Various references are made to the Australian Charities and Not for profit Commission (ACNC) Bill. This, these governance proposals and various other consultations and pieces of proposed reform relate closely to each other and it would have been helpful to adopt a Principles Approach to oversee them all.

Responses to consultation questions

Questions 1 - 10

Most organisations have, within their constitutions, reference of who they owe their duties to. The inclusion of the “general public” raises difficulties. At a headline aspirational stage this is fine – Anglicare agencies are highly cognisant of the stewardship they owe to their communities. Anglicare members are aware of the place they hold in society and the trust placed in them by donors, clients and, generally, the public at large and would not seek to duck this obligation. However just how this obligation is owed and to who needs to be carefully defined before it is accepted via these proposals and the ACNC Bill.

It is noted that the traditional tight feedback loop that FPs have between the shareholder and the company may not be present between the NFP and their beneficiary or client. However where a “client” is involved this is replaced by tight funding contract controls and a myriad of legislation and controls including public liability, privacy legislation, duty of care, health and safety, etc. To try to recreate the shareholder/company relationship by creating a relationship between the NFP and the public at large may not achieve the desired effect. If the lack of this relationship is truly problematic for the government then other avenues should be explored. One avenue is through the ACNC’s powers to intervene when the entity does not follow its own rules and constitution.

The duties of responsible individuals are well understood by those organisations responding to either Corporations Act or the Incorporated Associations Act of their Jurisdiction. The duties described by the ACNC for NFPs should remain close to these so as to allow efficiency of understanding for those Board members sitting on both kinds of Board or multiple Boards. This also allows for greater public understanding (and therefore accountability) through greater common exposure.

We should try hard to find ways to codify the behaviour we desire from board members rather than leap to the easy option of qualifications. Board members are hard to find, increasing responsibility and the plethora of current reforms do frighten people off, especially from smaller organisations where sophisticated risk management practices may not be in place. Regional, small, or Indigenous organisations may not have members that have engaged with traditional educational institutions and processes and the requirement for particular formal qualifications may further impede them in

achieving governance. With the move to competency based assessment in other areas, requiring particular qualifications in this instance does not seem in keeping with the principles based approach.

Standardising duties should take account of the proportionality for small agencies as per the tiering in other areas. Anglicare Australia argued in response to the Senate Inquiry into the *Disclosure Regimes for Charities and Not for Profit Organisations* that proportionality should not only be applied to size but to risk¹. Where a charity is caring for vulnerable people for major parts of their lives (for example one providing residential care for people with disabilities), this is obviously higher risk than, for example, an organisation existing to promote the craft of embroidery and fellowship between its members.

Questions 11 – 15

As previously stated one principle for any change should be to keep the requirements on NFPs and FPs similar to allow for movement between and general understanding.

Remuneration for Board members is extremely rare in the Anglicare network as in other parts of the sector. It should never be assumed that pay will equal better governance automatically and it should be noted promoting it would require funding agencies to allow for funds for this in their contracts and agreements. Additionally it could lead to competition between those able to pay and those not able to (those for example self-funded without government funding).

Questions 16 – 19

The final report of the Scoping Study for a National NFP Regulator found that a principles-based approach to governance should be promoted. To mandate an investment strategy for example (question 17) or minimum insurance requirements (question 18) would not seem to fit this approach as well as a principle that requires, for example, adequate and appropriate regard to risk and to future sustainability.

With further regard to the question of minimum insurance, etc (question 18) again we would caution for proportionality – to the size of the activity and the risk involved. Amounts required for NFPs in receipt of grants from governments have resembled a bidding war at an auction over recent years with seemingly little relevance to the actual organisation or its business being taken into account.

Question 20

In setting the levels of internal review it would seem useful to adopt those already commonly in place through relevant Incorporated Associations legislation and the Corporations Act. It would also seem useful to peg them to those required for FPs. Again this meets the principle of least change and greatest transportability of knowledge.

Questions 21 – 25

We would strongly favour the development of model rules. These allow for board members to get across the actual business of the organisation much more quickly as constitutions are similar across the sector. It also allows for greater transparency and accountability and members of the public, clients or other stakeholders won't necessarily require extensive (and expensive) legal advice if they wish to interpret or

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http://www.anglicare.asn.au/documents/AASubmissionondisclosureregimesforcharitiesandNFPs_Aug08.pdf

untangle a constitution. This also lowers legal costs for organisations setting up or seeking to alter their rules.

To have the core of the Constitution set would then require that any organisation seeking to make changes would have the responsibility to ensure that those changes were acceptable to the Definition of Charities, requirements from the ATO, the ACNC legislation and any other relevant areas.

The exposure draft of the ACNC Bill seems to give the Commission powers along these lines and obviously the timing of the two pieces of work does allow them to be considered together.

Questions 26 – 28

The relationship with members is perhaps one of the more defining governance characteristics of NFPs. For many this is at the core of how they constitute themselves and we would therefore not like to see mandated provisions in this area. We would see it as totally inappropriate for a principles based approach to set out compulsory meeting requirements. Model rules would cover off on Annual General Meetings, notice to members of such and Special meeting requirements. To mandate any more firmly will lock agencies into regimes that may well be difficult to fulfil especially for those in regional areas, for national organisations or with members with mobility issues as just three examples.

Questions 29 – 33

The principles stated by the Commission of England and Wales and referenced in the paper seem to provide a good starting point for the Australian context. We are concerned that the specificity of many of the consultation questions in this paper however seems counter to any desire to instigate and operate a principles based approach.

Our largest concern in these changes and how they affect our membership and the NFP sector in general is that they do not drive more red tape nor duplicate existing reporting arrangements. It is vital that at the very least Commonwealth Government Departments recognise these principles and are required to remove duplicated requirements from their grant and contract negotiations. A quick glance at Anglicare Australia members' contracts show examples such as requirements for public liability amounts (usually way out of line with the activity being undertaken), behaviour of responsible persons (including consideration of driving offences), and auditing requirements outside of International and Australian Accounting Standards. These must be removed before or as any other governance structure is put into place.

The ACNC will need authority to require that Commonwealth Departments do indeed drop clauses covered by the governance arrangements as well as authority over NFPs and charities. Of course it would be greatly beneficial if State and Territory governments could also use this approach but the Commonwealth must lead the way with this.