

Submission to Treasury Regarding the *Review of Not-for-Profit Governance Arrangements – Consultation Paper* December 2011

**Prepared by:
ANGLICARE Diocese of Sydney**

January 2012

1. SUMMARY OF SUBMISSION

General Principles

- 1.1 ANGLICARE Sydney supports, in principle, the establishment of the ACNC but is concerned that the focus is solely regulatory and other reforms for the sector recommended by the Productivity Commission are not being addressed. Nor does in principle support guarantee support for the final regulatory framework, which is of course, dependent on the legislative detail which will apply with the establishment of the ACNC.
- 1.2 In relation to the scope and role of a regulator, it is important that the Government takes into account the faith-based origins of many NFPs involved in social service provision. The Government needs to ensure that the religious freedoms that faith-based organisations currently enjoy are protected and not infringed by a process of regulation.
- 1.3 In terms of a regulatory framework for the NFP sector, ANGLICARE Sydney would support a 'principles based' or educative approach rather than an approach that is overly prescriptive and would result in increased regulatory burden and compliance.
- 1.4 Without harmonisation between the current Federal and State funding systems the proposed regulator's role will be limited, compliance burdens will increase and the governance arrangements may be piecemeal.
- 1.5 Although not addressed in the Consultation Paper a key role of the NFP sector is its capacity to advocate on key policy issues to Government. There needs to be some assurance provided to the sector that such advocacy will not in any way be impeded by the proposed new regulatory framework.
- 1.6 ANGLICARE Sydney recognises as does Government the considerable and complex diversity of the NFP sector, in terms of size, purpose, staffing, role of volunteers, nature and source of funding and relationship with government. Given this complexity and diversity it is important for Government to consider staging the implementation of governance standards for the sector for at least a 12 month period between 1 July 2012 and 1 July 2013 in order to determine the impact that such new governance arrangements will have on all parts of the sector. Otherwise there is the risk that instead of reducing the compliance burden the amount of red tape will escalate and some smaller NFP's may be constrained in their purpose or forced to quit the sector thus reducing the public benefit to the community.
- 1.7 Staged implementation of such governance arrangements is also desirable in a context of considerable change given the expected implementation of a National Disability Insurance Scheme, a proposed Gateway for Aged Care and significant changes in client directed care as distinct from bloc funding arrangements. The extent and rapidity of such change will impact the sector and require a considerable period of adjustment.
- 1.8 ANGLICARE Sydney also considers it is important for the ACNC to take into account not just the complexity of the sector but the diversity of key stakeholders which operates in a NFP environment. These stakeholders may range from government funding bodies to donors, synods and parishes. It is this diversity which needs to be taken into account when developing governance protocols.

1.9 ANGLICARE Sydney is also concerned that many of the governance standards referred to in the Consultation Paper derive from the For Profit corporate model but more work needs to be done to determine the impact that such standards, which operate effectively in a for profit environment, may have on the not for profit sector, and in particular, on the sustainability of smaller not for profits.

Responsible Individuals

1.10 ANGLICARE Sydney considers that in relation to large NFPs, the definition of 'responsible individuals' needs to be limited to the Directors of the governing board or council of such an agency and only extended to include the Corporations Act concept of "officer" for large NFPs.

1.11 ANGLICARE Sydney supports the view that 'responsible individuals' need to exercise appropriate duty of care and diligence, act in the best interests of the entity, not misuse or abuse their position or information received and should disclose any relevant material personal interests.

1.12 ANGLICARE Sydney also endorses the position that such 'responsible individuals' should clearly understand their role, be aware of their legal obligations and ensure that the NFP entity is operating to the highest standards.

1.13 The constituency of NFP's needs to be considered in the exercise of duties by 'responsible individuals' but it is not necessary that this constituency be legislatively prescribed and defined.

1.14 The Australian Accounting Standards Board requirements be a sufficient financial reporting framework for the mid tier and top tier NFP's. These standards provide a framework for disclosure and transparency. Requirements for disclosure and transparency of fund raising costs need to be worked out in close consultation with the NFP sector

1.15 ANGLICARE Sydney would support any requirement made by the ACNC that 'responsible individuals' declare any material personal interests and any conflict of interest which may arise.

1.16 Legislatively, it should be sufficient to require 'responsible individuals' to declare and manage a conflict of interest. How to manage such conflict could be considered part of the guidance offered by the ACNC to the NFP sector more generally.

Risk Management

1.17 Risk management is important for all NFPs. However mandatory risk management should be limited to large (Tier 3) NFPs and this should include appropriate policies and procedures to identify risks, manage and mitigate such risks, report, monitor and annually review such risks. Tier 3 NFP's should be mandated to employ internal and external audit processes in line with the current requirements of the Corporations Act and the Australian Accounting Standards Board.

- 1.18 ANGLICARE Sydney supports, in principle, the provision of minimum requirements which require governance to be provided in the legislation but without such legislation prescribing the exact nature of the governing rules for each entity.
- 1.19 Provision of minimum governance requirements should not, however, give the ACNC the power to amend the governing rules of a registered entity although it could require that entity to meet to discuss and explain or justify any issues which have been identified by the ACNC.
- 1.20 Once the governing rules are established by the entity, within the legislative requirements provided by the ACNC, the ACNC should then have the power to enforce the rules if it comes to their attention that those rules are being seriously breached.
- 1.21 ANGLICARE Sydney believes that reduction of 'red tape' for NFP's will only occur if a 'report once use often' approach is adopted.
- 1.22 Reducing red tape is not just an issue about reporting back to funding bodies. It is also about streamlining the tender process, simplifying contracts, extending the length of contracts, streamlining the diversity in requirements for current acquittal processes, and the standardisation of reporting and acquittal dates. ANGLICARE Sydney seeks clarification on whether or not these reforms to reduce the bureaucratic burden on NFP's come within the purview of the ACNC or are to be pursued separately by government departments.

1. INTRODUCTION

1.1 Who We Are

ANGLICARE Sydney is a Christian organisation operating a wide range of community services and programs across the Sydney Metropolitan and the Illawarra regions of New South Wales; it embodies the Christian commitment to care for all people in need, as comes from Jesus' command to love your neighbour as yourself.¹ Our range of services include: counselling and family support services (including Family Relationship Centres); community education for families; disability case management and respite; youth services; emergency relief for people in crisis; foster care and adoption for children including those with special needs; migrant services including humanitarian entrants and newly emerging communities; English as a second language classes (ESL); aged care, both through nursing homes and community services; opportunity shops providing low-cost clothing; emergency management services in times of disaster; and chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions.

1.2 Purpose of this Submission

- 1.2.1 Treasury released a consultation paper on *a Review of Not for Profit Governance Arrangements* in December 2011 requesting feedback from the sector, as part of an ongoing process.
- 1.2.2 ANGLICARE Sydney made a submission in February 2011 in response to the *Scoping Study for a National Not-for-Profit Regulator*. The final report by Treasury was released in April 2011 with a view to an Australian Charities Not for Profit Commission (ACNC) being established by mid 2012.

¹ The Gospel of Matthew, chapter 22 verse 39.

- 1.2.3 ANGLICARE Sydney's current submission comments on the most recent consultation paper (December 2011) and makes reference to the Final Scoping Study report (April 2011).

1.3 ANGLICARE Sydney's Current Governance Arrangements

- 1.3.1 Under the Anglican Church of Australia (Bodies Corporate) Act 1938, the Sydney Anglican Home Mission Society Council was incorporated under the name "Sydney Anglican Home Mission Society Council" by Order published in the Government Gazette on 4 February 1972.
- 1.3.2 The Sydney Anglican Home Mission Society operating as ANGLICARE Diocese of Sydney is governed by a Council, which is appointed by the Anglican Synod of Sydney under an amended ordinance of 1981 which superseded all previous Ordinances in relation to the Council. This Ordinance is supplemented by a Chart of Delegations which details Council's responsibilities.
- 1.3.3 ANGLICARE Diocese of Sydney is constituted by ordinance of the Anglican Synod of Sydney and incorporated as a body corporate under the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW) under the legal name "Sydney Anglican Home Mission Society" by Order published in the Government Gazette on 4 February 1972.
- 1.3.4 ANGLICARE Diocese of Sydney is governed by a Council which is appointed by the Anglican Synod of Sydney pursuant to its constituting ordinance. The Council's responsibilities under the Ordinance are supplemented by a Chart of Delegations.
- 1.3.5 The Synod, as the "parliament of the diocese", has a responsibility to the wider community and ultimately the authority to determine and facilitate the implementation of appropriate governance standards for those diocesan organisations, both incorporated and unincorporated, constituted by the Synod.
- 1.3.6 There is an expectation that the Council addresses the highest standards of corporate governance to meet the objects of ANGLICARE which are to further the work of the Anglican Church of Australia within the Diocese of Sydney by proclaiming the love of God as shown in Christ in promoting and conducting activities of a pastoral missionary, social welfare and charitable nature to be executed by the relief of poverty or other charitable means.
- 1.3.7 Membership of Council consists of the Archbishop and Anglicare Sydney's CEO, nine (9) persons elected by the Synod, at least three (3) of whom must be members of the clergy, and up to two (2) persons appointed by the Archbishop, at least one (1) of whom must be a member of the clergy and up to one (1) person appointed by the other members of the Council.
- 1.3.8 For the purposes of its objects, the Council has power to receive, manage and control all property of the Council together with the income derived there from. It also has power to use and apply the capital and income of such property for the purposes of its objects, subject to the terms of any specific trusts of that property.
- 1.3.9 The Council has total authority over the organisation, including over the Chief Executive Officer, and total accountability for the organisation.

2. GENERAL OBSERVATIONS ON REGULATION OF THE NOT FOR PROFIT SECTOR

- 2.1 The need for a national NFP regulator has long been recognised and was identified in both the Henry Tax Review and Productivity Commission reports. The Tax Review advocated the establishment of a national charities commission to monitor, regulate and provide advice to all NFP organisations.² The Productivity Commission recommended that the Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations.³
- 2.2 The aim of the new ACNC, according to the Consultation Paper, is to ‘improve public trust and confidence in the sector, through promoting governance, accountability and transparency of the NFP sector’.⁴ Further, the intent of the governance review is to ‘centralise and simplify the existing arrangements in order to reduce red tape and minimise compliance burdens for the sector’.⁵
- 2.3 ANGLICARE Sydney is concerned that there is a focus on improving the public trust and confidence in the sector but it is our view that such trust and confidence in the sector is currently very high. Historically the sector is well regarded by the community. To suggest otherwise sends a strong signal of distrust from the Government to the sector.
- 2.4 Further ANGLICARE Sydney is concerned the focus of such legislation is purely regulatory. We note that, by contrast, the Productivity Commission identified the need not only for better regulation of the sector but also other reforms including the establishment of a Centre for Community Service Effectiveness, to promote best practice approaches to evaluation, and an Office for Not-for-Profit Sector Engagement. These other areas for reform are not acknowledged in Treasury’s Consultation Paper; it is unclear therefore how the broader reform agenda will be driven to ensure that reform is wider than issues pertaining simply to the regulation of the sector. ANGLICARE Sydney believes it is important that the establishment of a new regulator take place as part of this broader reform agenda, with a focus on capacity building and providing assistance to the sector rather than focusing just on regulation.
- 2.5 ANGLICARE Sydney recognises, as does Government, the considerable and complex diversity of the NFP sector, in terms of size, purpose, staffing, role of volunteers, nature and source of funding and relationship with government. Given this complexity and diversity it is important for Government to consider staging the implementation of governance standards for the sector for at least a 12 month period between 1 July 2012 and 1 July 2013, in order to determine the impact that such new governance arrangements will have on all parts of the sector. Otherwise there is the risk that instead of reducing the compliance burden the amount of red tape will escalate and some smaller NFP’s may be constrained in their purpose or forced to quit the sector thus reducing the public benefit to the community.

² Australia’s Future Tax System. (2009). *Australia’s Future Tax System. Report to the Treasurer*, The Treasury, Canberra, p43.

³ Productivity Commission. (2010). *Contribution of the Not-for-Profit Sector*, Research report, Canberra.

⁴ Commonwealth of Australia. (2011). *Review of Not for profit Governance Arrangements*, The Treasury, Canberra, p1.

⁵ Ibid.

- 2.6 Staged implementation of such governance arrangements is also desirable in a context of considerable change given the expected implementation of a National Disability Insurance Scheme, a proposed Gateway for Aged Care and significant changes in client directed care as distinct from block funding arrangements. The extent and rapidity of such change will impact the sector and require a considerable period of adjustment.
- 2.7 ANGLICARE Sydney also considers it is important for the ACNC to take into account not just the complexity of the sector but the diversity of key stakeholders which operates in a NFP environment. These stakeholders may range from government funding bodies to donors, synods and parishes. It is this diversity which needs to be taken into account when developing governance protocols.
- 2.8 ANGLICARE Sydney is also concerned that many of the governance standards referred to in the Consultation Paper derive from the for profit corporate model but more work needs to be done to determine the impact that such standards, which operate effectively in a for profit environment, may have on the not for profit sector and, in particular, on the sustainability of smaller not for profits.
- 2.9 In relation to the scope and role of a regulator, it is important that Government takes into account the faith-based origins of many NFPs involved in social service provision. The Government needs to ensure that the religious freedoms that faith-based organisations currently enjoy are protected and not infringed by a process of regulation. While issues of religious freedom do not affect all NFPs, nevertheless many significant organisations in the sector are faith-based, with a mission that flows from religious beliefs and values. Consultation with faith-based organisations in the sector around this issue would be appropriate, given the significance of such organisations to the sector.
- 2.10 In terms of a regulatory framework for the NFP sector, ANGLICARE Sydney would support a 'principles based' or educative approach rather than an approach which is overly prescriptive, resulting in an increased regulatory burden and compliance. We also support, in principle, that such governance arrangements should be flexible and ensure a reduction both in 'red tape' and in duplicative governance arrangements.⁶ We note that such governance arrangements may improve the reputation of NFPs with donors by assuring them of professional management practices, as well as providing opportunities to benchmark and set minimum standards for the NFP sector over time.
- 2.11 If this is to be a national NFP regulator which operates across all State jurisdictions then it will require significant harmonisation with states and territories for those NFP's that are state based or operate a mix of federally and state funded programs. Without this harmonisation, the regulator's role will be limited, compliance burdens will increase and the governance arrangements may be piecemeal.
- 2.12 Treasury recognises the mission-based focus of many NFP's. However Treasury also notes that 'NFP's must still ensure that the public monies received are being spent according to the purpose for which they were provided...and that they are operating in accordance with the law at all times'.⁷ It should be recognised that there is currently a very high level of accountability placed on NFP's in relation to the acquittal of funds received from

⁶ Ibid p8

⁷ Ibid p9

government for program and service delivery. Amendments to current governance arrangements are not likely to establish higher levels of financial accountability or transparency than are currently in operation for NFP's in the expenditure of government funds.

2.13 Is it intended that the new governance and regulatory arrangements implemented by the ACNC will replace the current contractual arrangements between NFP's and their funding bodies? The Consultation Paper notes that 'the ACNC will administer the national regulatory system, which will remove or reduce the need for governance requirements to be imposed by other instruments such as government contracts'.⁸ ANGLICARE Sydney believes that this is an important statement which requires further elaboration and clarification. Currently the tender process, the negotiation and implementation of government contracts, the regular reporting on outputs back to government and the acquittal of funds for individual programs provides the framework for operational activities for all government funded programs and services

2.14 Although not addressed in the Consultation Paper a key role of the NFP sector is its capacity to advocate on key policy issues to Government. There needs to be some assurance provided to the sector that such advocacy will not in any way be impeded by the proposed new regulatory framework.

3. RESPONSIBLE INDIVIDUALS

3.1 Exercise of Responsible Individual's Duties

The Consultation Paper asks –

1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?
2. Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?

3.1.1 ANGLICARE Sydney considers that in relation to large NFPs, the definition of 'responsible individuals' needs to be limited to the Directors of the governing board or council of such an agency and only extended to include the Corporations Act concept of "officer" for large NFPs

3.1.2 ANGLICARE Sydney supports the view that 'responsible individuals' need to exercise appropriate duty of care and diligence, act in the best interests of the entity, not misuse or abuse their position or information received and should disclose any relevant material personal interests.

3.1.3 For NFP's it is critical to ensure faithfulness to the mission of the organisation and responsible individuals need to be responsible, in the exercise of their duties, to a broad constituency which includes staff, volunteers, donors and clients as well as the wider community more generally. Building, nurturing and maintaining the trust of that constituency is critical to achieving mission. A key enabler of that trust is an organisation's transparency and accountability to its core constituency. However, while

⁸ Ibid p15

this constituency need to be considered in the exercise of duties by ‘responsible individuals’, it is not necessary that this constituency be legislatively prescribed and defined since this would move away from the ‘principles based’ approach being endorsed by government in the establishment of the ACNC.

3.2 Core Duties of Responsible Individuals to be Prescribed by the ACNC

The Consultation Paper asks:

3. What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?

- 3.2.1 Duties of responsible individuals should be to act in good faith and in the best interests of the entity to support its mission, to ensure reasonable duty of care, not to improperly use information or abuse their position and to disclose and manage conflicts of interest.
- 3.2.2 ANGLICARE Sydney also endorses the position that such ‘responsible individuals’ should clearly understand their role, be aware of their legal obligations and ensure that the NFP entity is operating to the highest standards.

4. DISCLOSURE AND CONFLICTS OF INTEREST

- 4.1 It is proposed in the Consultation Paper that tiered or proportional reporting requirements will be introduced within the legislative framework of the ACNC.⁹ Currently ANGLICARE’s financial reporting aligns with that set by the Australian Accounting Standards Board. This should be a sufficient financial reporting framework for the mid tier and top tier NFP’s. These standards provide a framework for disclosure and transparency.
- 4.2 ANGLICARE Sydney would support any requirement made by the ACNC that ‘responsible individuals’ declare any material personal interests and any conflict of interest which may arise. This includes a situation where personal gain may be achieved because of information received in relation to the NFP or as a result of the position held.

The Consultation Paper asks:

12. Should the remuneration of responsible individuals be required to be disclosed?

15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFP’s should disclose and manage? Or should it be based on the Corporations Act understanding of ‘material personal interest’?

⁹ Ibid p20

4.3 ANGLICARE Sydney does not see that there is a legislative requirement for the disclosure of remuneration of 'responsible individuals' as there are no shareholder distributions. If disclosure is required then this should be disclosed as a group which does not detail individual remuneration packages.

4.4 The types of conflict which should be disclosed and managed are adequately covered under the Corporations Act understanding of 'material personal interest'. Legislatively, it should be sufficient to require 'responsible individuals' to declare and manage a conflict of interest. How to manage such conflict could be considered part of the guidance offered by the ACNC to the NFP sector more generally.

5. RISK MANAGEMENT

5.1 Risk management is important for all NFPs. However mandatory risk management should be limited to large (Tier 3) NFPs and this should include appropriate policies and procedures to identify risks, manage and mitigate such risks, report, monitor and annually review such risks.

5.2 It is also essential for the larger(Tier 3) NFP's, as a minimum, need to have in place appropriate insurance coverage including public liability, professional indemnity, voluntary workers accident insurance and property insurance.

5.3 Responsible individuals for Tier 3 NFP's could, as a minimum, be required to have indemnity insurance.

6. INTERNAL AND EXTERNAL REVIEWS

The Consultation Paper asks:

20. What internal review procedures should be mandated?

6.1 Tier 3 NFP's should be mandated to employ internal and external audit processes in line with the current requirements of the Corporations Act or the Australian Accounting Standards Board.

7. MINIMUM REQUIREMENTS FOR AN ENTITY'S GOVERNING RULES

The Consultation Paper asks:

21. What are the minimum requirements that registered entities should be required to include in their governing rules?
22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interest of the public?
23. Who should be able to enforce the rules?

- 7.1 ANGLICARE Sydney supports, in principle, the provision of minimum requirements which require governance to be provided in the legislation but without such legislation prescribing the exact nature of the governing rules for each entity.
- 7.2 It is also important to recognise the faith-based nature of many NFP's and how their faith-based mission is often reflected in the minimum or essential requirements for appropriate governance. Best practice governance models for NFP's should be developed via education rather than as a prescribed governance model.
- 7.3 Broad areas which could be included as minimum requirements for NFP's might include Board responsibilities and delegations.
- 7.4 Provision of minimum governance requirements should not, however, give the ACNC the power to amend the governing rules of a registered entity, although it could require that entity to meet to discuss and explain or justify any issues which have been identified by the ACNC.
- 7.5 Once the governing rules are established by the entity within the legislative framework of minimum requirements provided by the ACNC, then the ACNC should have the power to enforce the rules if it comes to their attention that those rules are being seriously breached.

8. SUMMARY QUESTIONS

The Consultation Paper asks:

30. How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?

- 8.1 ANGLICARE Sydney believes that reduction of 'red tape' for NFP's will only occur if a 'report once use often' approach is adopted.
- 8.2 It is important to establish the nature of such reporting to the ACNC if red tape is to be reduced in the future. For instance, there is currently a significant emphasis on input/output reporting but little emphasis under government contractual and funding body reporting

models to report on outcomes for clients. Will any new reporting arrangements required by the ACNC be limited to financial reporting or will it also require reporting on details of program outputs and outcomes? If it is the latter, will this then mean that such reporting no longer occurs back to the federal and state funding bodies but only to the ACNC who will then refer the reporting on to the relevant departments?

- 8.3 In order to reduce duplicative processes, whatever is reported to the ACNC as part of the new framework, should not then be a required part of reporting back to the original funding bodies. Otherwise, the whole process will not reduce red tape but increase the compliance and reporting burden for NFP's.
- 8.4 In order for duplicative reporting processes to be reduced, and not increased under the proposed new ACNC framework, the Commonwealth will need to reach agreement with the states, which currently fund many NFP programs.
- 8.5 Reducing red tape is not just an issue about reporting back to funding bodies. It is also about streamlining the tender process, simplifying contracts, extending the length of contracts, streamlining the diversity in requirements for current acquittal processes, and the standardisation of reporting and acquittal dates. ANGLICARE Sydney seeks clarification on whether or not these reforms to reduce the bureaucratic burden on NFP's come within the purview of the ACNC or are to be pursued separately by government departments.

9. CONCLUDING REMARKS

ANGLICARE Sydney appreciates the opportunity of participating in the consultation process and looks forward to further opportunities to do so over the coming months.

Grant Millard



Chief Executive Officer

ANGLICARE Sydney