



## Submission to Treasury Review of Not-For-Profit Governance Arrangements (Jan 2011)

The St Vincent de Paul Society (the Society) welcomes sector reform and the opportunity to contribute to the process. We remind the government of our commitment to the *National Compact* and our shared vision of genuine collaboration, trust and partnership between the sector and government.

### Summary of Recommendations

The St Vincent de Paul Society, National Council recommends:

- That the new regulatory framework takes into account the diversity of entities and avoids being overly prescriptive of governance arrangements.
- That the ACNC place greater emphasis on an educative and advisory role rather than a compliance role.
- That the ACNC should be independent of Government and subject to judicial review.
- The Timeline for the establishment of the ACNC be reassessed. All measures should be taken to allow time for the collaborative co-design of the regulatory framework to take place before binding regulations are enacted.
- That if the regulation is to be implemented *before* an agreement is reached with the States and Territories, then the likelihood of an indefinite 'transitional period' should be acknowledged in the design of transitional arrangements. We recommend 'passive compliance' be a guiding principle of transitional arrangements.
- Against using a simplistic common financial measure like the 'proportion of donations that reach beneficiaries'. We believe that single financial measures an unworkable and unreliable indicator of the outcomes of an entities work. The reporting requirements outlined in the *ACNC Implementation Paper* are more suitable.
- That the regulatory framework be careful not to reduce the significance of systems advocacy for garnering better outcomes for beneficiaries. Advocating for social change is a critical part of Vincentians stated mission.

## Overview

The St Vincent de Paul Society is a global charity established in France in 1833. It has a Catholic ethos, but it does not form part of the structural Catholic Church. The Society is not an ecclesiastical organisation, but rather a lay organisation of people committed to doing charitable (the Society prefers “good”) works.

The Society has been present in Australia since 1854 and expanded throughout Australia within the separate colonies. The first national executive or ‘National Council’ of the colonial (later, State) operations was formed in 1895. The Society in Australia is a membership-governed, democratic organisation that:

*“...aspires to live the gospel message by serving Christ in the poor with love, respect, justice, hope and joy, and by working to shape a more just and compassionate society.”*

The Society operates under an international constitution or statute called ‘The Rule’. Member countries must follow the Rule which among many matters includes rules about disclosure regimes, regulation and legal forms. For example Article 3.14 requires:

*... the Society uses money and property to help relieve the suffering of those in need. The Society’s funds must be handled with utmost care, prudence and generosity. Money must not be hoarded. ... Accurate records must be kept of all money received or spent. The Society must not allot funds to other organisations...*

The Society understands that the poor have a moral right to the funds of the Society and that the Society is a steward of this resource. A basic principle of Catholic social teaching is Distributive Justice: goods and the burdens of the community are to be shared on the basis that not all people can contribute in the same manner. Another principle is the Preferential Option for the Poor where the greater the needs of the people the greater the responsibility of authorities and those with the capacity to meet those needs. Stewardship places great demands on the Society to always be transparent in its dealings and ensure that resources are best used for ending poverty. As the Society works with those who have beneficial ownership of the Society’s funds, the Society must always have open two-way communication and build trust by acting honestly and with genuine regard for those assisted.

In a 12 month period the Society in Australia responds to around 1 million calls for financial or material assistance, operates 630 Centres (Vinnies shops), provides around 2,500 beds a night to people in needing accommodation and provides over one million meals. We provide material assistance and specialist services valued at around \$150 million a year.

The Society consists, of over 50,000 members and volunteers across Australia,. Our basic organisational unit, known as a Conference, is the most common vehicle for participation in the works of the Society. There are currently 1180 active Conferences in Australia. There are also the Centres (shops) and a number of specialist services such as *Night Patrols*, offering sustenance, material support, information and companionship, and *Homework Help* for the children of refugee families.

We also see our charitable work as being inextricably tied to our obligation to engage in advocacy to address the structural causes of poverty and inequality. When we speak about social justice we go to the heart of what the St Vincent de Paul Society stands for. We are called, as Vincentians, to feed, clothe, house and assist our brothers and sisters who are forced onto the margins of society.

We are also called to ask why they are left out and pushed out. As our founder, the 19<sup>th</sup> century French activist-academic, Frederic Ozanam, wrote:

*"You must not be content with tiding the poor over the poverty crisis. You must study their condition and injustices which brought about such poverty with the aim of long term improvement"*

The Society supports regulatory reform of charities that seeks international best practice to support charities through better regulation and legal forms. The Society notes that charities are already regulated and that the charitable sector must have input into future reforms and the resultant guidelines. The government risks unnecessarily hindering the activities of charities like the Society unless the national regulatory system is supported and designed by charities for charities. Any national regulator should preferably be independent of government and subject to judicial review to avoid any conflict of interest or undue political interference. The national regulator should have an educative and advisory role before any enforcement role.

In addition charities must be able to determine and change their corporate structure to suit their particular needs in serving disadvantaged Australians.

It is from this perspective that the Society approaches disclosure regimes, regulation and legal forms, and other measures at a national, state and local level. Disclosure regimes, regulation and legal forms are not required to bring charities into line or as a simplistic measure to protect philanthropic activity, but rather to ensure proper stewardship of precious resources in the Society's fight to mitigate poverty and inequality.

The Society therefore seeks a regulatory framework for the charitable and not-for-profit sector that:

- **Acknowledges the different charisms of all charities and not for profits and notes that they have different outputs which require unique ways to value individual outputs. Therefore in implementing a regulatory regime the Society does not consider one size fits all.**
- **Respects and fosters the diversity of a vibrant civil society in Australia**
- **Supports and assists the objectives of organisations, especially where these are focussed on social justice outcomes, including advocacy**
- **Is responsive to broader social need**
- **Does not increase the compliance burden but actually reduces red tape and eliminates multiple reporting**
- **Does not result in a decline in the willingness of volunteers to participate in our organisations, particularly at the level of responsible oversight of governance**
- **Does not result in a culture of surveillance and intrusion**

We welcome this opportunity to respond to the ACNC Bill Exposure Draft and the Governance Consultation Paper and we welcome the Government's intention to establish an ACNC that is consonant with the points outlined above.

## Comments on the Consultation Paper

[Numbers in brackets refer to relevant paragraphs of the Consultation Paper].

In making the comments that follow, the Society has been mindful of the Discussion Paper *Implementation Design of Australian Charities and Not-for-profit Commission* (9 December 2011). We will be making separate comment on this paper. For the purposes of the following comments which address basic policy issues, the implementation design is unreliable as it is yet to be subject to foreshadowed public consultation, and it may undergo change in the light of experience. The degree of change may be significant having regard to the objects of the proposed governing Act. Those objects include promoting the ‘transparency’ of entities regulated under the Act (Section 2-5 of the Exposure Draft of the Bill). Ruling by either the Commission or by judicial interpretation could lead to a greatly extended concept of ‘transparency’.

### Timeline and Transitional Arrangements

The Society feels obliged to express its concern at the proposed timing of the introduction of the new regulatory regime. The Governance Consultation Paper (“the Paper”) acknowledges that most charities and other NFPs have effective and thorough governance policies in place (7). This would seem to justify advancing carefully rather than with the haste necessitated by the July 1 deadline for the establishment of the ACNC, especially given the outstanding issue of state and territory co-operation. (22) As yet, there is no assurance that a Commonwealth agreement will be reached.

The Paper acknowledges that negotiations with the States and Territories may take time and that during a transitional period some duplication may result (23). The Paper asserts that in the transitional period governance arrangements (under separate jurisdictions) are likely to be similar and not impose a large burden on NFPs. The Society urges that affected organisations are given more definite assurances on future steps before any legislation proceeds.

### Charity and NFP Distinction

In the Society’s view, a pivotal issue arising from the Paper is the minimal distinction between charities and other not for profit organisations (“NFPs”). The title of the foreshadowed Commission clearly implies recognition within government that there is a distinction of substance, and that is reinforced by the earlier Consultation Paper *A Definition of Charity* (October 2011), which states “the development of a definition of charity seeks to improve the viability of the NFP sector by providing increased certainty and consistency on the meaning of charity” (Summary point 3).

Yet the current Paper seldom mentions charities in their own right. Indeed the Introduction to the Paper (first paragraph) makes plain that a decision has been taken within government that the review into appropriate governance arrangements for organisations registered under the proposed legislation, is to proceed “regardless of entity type”.

That raises legitimate concerns for us whether the unique features of the Society (and no doubt other charities, but we have no remit to speak on their behalf) have sufficient delineation in the minds of those conducting the current review. There are several comments in the Paper that justify our concern.

The foreword correctly states that “charities make a very important contribution to Australian society”. The Paper later acknowledges the increased involvement of NFPs in service delivery for government (55), and that is no more apparent than in the case of charities. However, the Paper

repeatedly assert that charities “receive a range of support from... governments including ...grants”. In the following sentence this is characterised as “generous” support. The same point is made at (33).

The grants that the Society receives from governments are specific purpose grants which have to be expended in furtherance of government programs (and accounted for accordingly). There is no provision of funds from governments to support the Society’s maintenance or growth or development of internal expertise. If there is generosity in government grants received by this Society, the generosity is directed to those in need, not to the Society, and we would not wish it otherwise.

The consequential concern that the Paper raises is the intention that organisational governance rules are to be proportional to the size of the entity affected, and size is to be measured in part by the extent of government assistance (12, 13.3, 37 and 80). We are not yet aware (beyond the exposure draft of the Bill and the *Implementation Design* Discussion Paper) how governance rules will vary between organisations but if they are progressively onerous then it would be perverse if funds provided under grants to advance government programs contribute to an organisation being placed under more demanding governance rules, quite apart from being required to account for use of the funds under the terms of the contract with government.

We would welcome a clearer exposition of the proportional governance rules and whether it is intended that all or only some portion of the quantum of government funding under a grant will contribute to determining the applicable governance regime.

### **Accountability Beyond Governance**

It perhaps bears repeating that under the Rule of the Society there can be no doubt that the Society recognises the obligation on it to meet all proper and prudent corporate governance, legal and accounting requirements that are placed on a modern organisation. But the Society goes beyond that. It would consider that if it met all specified requirements it would have failed in its mission if it had not lived out the ethos that must inspire its members. Society meetings at all levels regularly commence with a period of reflection on the ideals that should govern the Society’s approach to the provision of assistance to those in need. Weekend retreats for the same purpose are held during the year.

In short the Society takes regular and practical steps to ensure that there is no “mission drift” to use the term of the Paper (eg 130)

We think the Paper is overly optimistic of the value of corporate governance within a charity. It is true as the Paper observes, that individuals who rely on charities (NFPs in the Paper) are often the most vulnerable in the community, and the Paper regards that as one reason why charities must have appropriate governance requirements in place (34 & 35). In the view of the Society that is not enough to measure the success of delivery of assistance to the marginalised.

The Society is ever conscious that in its activities it is not only how many individuals are assisted by the Society (although that is important as a measure of activity and prudent use of funds) and it is not only a matter of meeting the required level of accountability to government (40.4), but with what spirit of genuine concern for those in need the assistance is provided. That is something that the Paper does not address and we regard that as a crucial factor in considering the societal value of charities’ activities.

## **Common Measure**

The Paper is inconclusive in its discussion of comments made by the Senate Standing Committee on Economics in 2008 regarding lack of public knowledge of the proportion of charitable donations that reach beneficiaries (116 – 118). Since the exposure draft of the Bill provides (Section 2-10) that the function of the Commissioner of the ACNC will include providing information about registered organisations to the public including on the ACNC website, the Society believes that this is a matter that requires detailed exposition and consultation with charities before legislation is introduced.

While there is attraction to disclosure using a common measure, there are important considerations that militate against simplistic answers. For example, if a charity is funded by its own efforts through trading activities as well as through donations, will the ACNC advise how funds from each source are to be directed to, on the one hand, beneficiaries and, on the other hand, to meet general overheads. Also, how might capital and maintenance expenditure on facilities that benefit those in need (e.g. shelters for the homeless) be allocated to the measure of individual assistance? There are also non-tangible forms of assistance to beneficiaries such as budget counselling.

The quest for such a measure to compare charities' individual effectiveness may lead to unhealthy competition between charities. That raises the important question whether the information that the Commissioner may provide on the ACNC website may be unintentionally misleading. The legislation, in the view of the Society should require the Commissioner to give an affected registered organisation prior advice of the information intended to be made public, and that organisation should be able to seek either the addition of sufficient explanatory material or the withholding of the information if the timing is inappropriate or there are other reasonable grounds for withholding. As we commented at the start of this section of our response, we are hesitant to accept the current implementation design as the enduring form of public reporting on charities, and accordingly charities need assurances in the governing legislation against implementing public reporting regimes that have potentially deleterious consequences for a charity.

## **Governance Structures and Volunteers**

Due to the far-flung and highly decentralised nature of our work in the community we are particularly concerned about the way that governance and compliance requirements will be structured and implemented under the proposed regulatory regime. The level of understanding by volunteers of the full ambit of Society works and to a lesser degree the level of commitment of some volunteers is varied. Where the Society provides assistance at the local level, the decision-making processes and authority to implement those decisions is delegated to the local parish conference. Whereas decision-making associated with professional service delivery programs is controlled at Board level and delivered through specific organisational plans. We have no hesitation in supporting a robust regulatory system but we wish to ensure that this does not negatively impact on our ability to continue with our work with people who are left out or pushed out of the social and economic mainstream. Nor do we wish to see an over zealous regulatory reform negatively impact on the volunteers' level of commitment to volunteering.

# CONSULTATION QUESTIONS

## RESPONSIBLE INDIVIDUALS' DUTIES

1. *Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?*

If duties are to be allocated in the legislation then the duties must be clear. The persons to whom the duties are owed is a subsidiary question which is liable to confuse the issue. For example, the duty to be financially responsible is owed to donors, recipients of the NFPs output and the Commonwealth.

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?*

Responsible individuals in NFPs need to consider a wide and flexible range of persons and responsibilities. Focusing on discrete classes and issues is unhelpful.

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

The duties should fit the task and administrative level of the relevant person in each organisation. For example, a peak counsel in a large organisation should have the duties appropriate to the Board of a public company, the duties of an employed counsellor should equate to a similar position in the public sector, the duties of a part time volunteer should equate to the existing common law duties of care

4. *What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?*

The minimum standard of care is already set by the common law, State industrial legislation, State and Commonwealth criminal codes, the Corporations Act and the many regulatory standards in specialised areas. Creating an additional burden solely for NFPs without addressing the existing high regulatory burden would simply impose a punitive impost on the sector which is likely to depress and stifle it rather than add any value.

5. *Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?*

No, unless commensurate qualifications are required in other areas. For example, NFPs delivering medical services would be already governed by the medical regulations, those providing accommodation and food are already governed by the regulations in that sector.

6. *Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?*

Standards should be commensurate to the level and function of a person in the organisation.

7. *Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?*

Yes, see the answers to questions 3 to 6 above.

8. *Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?*

Applying a higher standard than the existing common law standards to volunteers would be a particularly onerous disincentive to that activity, which must be considered likely to discourage it. This would lead to an extremely negative public policy position.

9. *Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?*

See the answer to question 3 above.

10. *Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?*

See the answer to question 3 above.

## DISCLOSURE REQUIREMENTS AND MANAGING CONFLICTS OF INTEREST

11. *What information should registered entities be required to disclose to ensure good governance procedures are in place?*

The information should be as follows:

- i. The vision statement of the organisation.
- ii. A full set of annual financial accounts in proper form for the size of the organisation.
- iii. A statement of the works acquitted by the organisation in a proper form for the size of the organisation.

12. *Should the remuneration (if any) of responsible individuals be required to be disclosed?*

No. The percentage of wages to monies administered or administrative costs to monies administered would be a more appropriate measure.

13. *Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?*

The principles set out in numbered paragraph 126 are appropriate measures for conflict of interest.



*14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?*

Generally speaking, NFPs created to benefit their donor groups or where there is a crossover between beneficiaries and management ought to comply with a specific and publicly stated standard. The content of the standard is problematic. For example, each sporting club which raises funds for its end-of-season tour will be obliged to comply.

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

Regardless of whether the test is lifted from the Corporations Act or somewhere else, ACNC governance obligations should be clearly and concisely stated in its own promulgated regulations.

## RISK MANAGEMENT

*16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?*

Proper financial standards should apply to all NFPs as well as standards to ensure an adequate duty of care to employees, volunteers and recipients. A higher standard than the existing standards found in the general law should not be mandated.

*17. Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?*

Only general principles in relation to risk management should be mandated for NFPs. The management of an organisation's resources is its own affair.

*18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?*

Appropriate insurance arrangements for particular activities would be an acceptable regulation.

*19. Should responsible individuals generally be required to have indemnity insurance?*

This question depends entirely upon the activity and size of the NFP. At a certain defined level, indemnity insurance is an appropriate regulation. The level should be set to cover risk events above a certain monetary value (say \$100,000).

## INTERNAL AND EXTERNAL REVIEWS

### *20. What internal review procedures should be mandated?*

The ACNC might publish a series of graduated internal review processes to moderate different situations. For example, large NFPs ought properly to be audited and comply with established governance procedures for major projects, the same organisations might have small local branches which collect funds or disperse services at a much smaller level for which the internal review is simply oversight from above.

## MINIMUM REQUIREMENTS FOR AN ENTITY'S GOVERNING RULES

### *21. What are the core minimum requirements that registered entities should be required to include in their governing rules?*

The core requirements are:

- i. A mission statement.
- ii. A defined hierarchy and a means of preserving that hierarchy (e.g. elections, appointments, etc.).
- iii. A provision for dealing with the organisations assets in accordance with public policy on winding up.

### *22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?*

Other than a general oversight of governing rules to prevent fraud, the ACNC has no role in interfering with the mission of an entity. Many NFPs have grown and transformed over time to meet new needs or fresh challenges. NFPs should jealously guard their independence and their capacity to identify new challenges or fresh areas of need without government interference

### *23. Who should be able to enforce the rules?*

Principally, the members of the NFP, and the ACNC in its limited role as the financial watchdog and auditor of activities which are fraudulent or not truly “not-for-profit”.

### *24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?*

The ACNC has a role in winding-up entities and detecting fraud or improper purpose, but not otherwise.

*25. Should model rules be used?*

Model rules are very helpful. They should be available but not obligatory. A set of principles to be included in each NFPs rules might be a more appropriate mandatory provision; these are likely to be structured along the lines of the ATO's definition of a charity.

## RELATIONSHIPS WITH MEMBERS

*26. What governance rules should be mandated relating to an entity's relationship with its members?*

The NFP sector is too large and diverse to properly govern the relationship between each different type of NFP and its members.

*27. Do any of the requirements for relationships with members need to apply to non-membership based entities?*

This is an example of the complexities referred to in answer 26 above.

*28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?*

Minimum requirements for an AGM to pass annual accounts may be appropriate but, apart from that, no general rule will fit all individual NFPs.

*29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?*

A "tiered" system of governance arrangements would be appropriate, with the large NFPs meeting the corporate standard for governance.

*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?*

Sadly, the reforms being proposed are unlikely to lead to a reduction in red tape because they add on additional layers of compliance without reducing any of the existing regulatory arrangements.

*31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?*

Financial reporting principles, fiscal transparency and general governance principles.

*32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?*

This is best answered by Indigenous NFP entities themselves.

*33. Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?*

Please refer to our summary of recommendations.