



PHILANTHROPY
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Re: Consultation paper: *Development of Governance Standards*

Philanthropy Australia welcomes the opportunity to comment on the Consultation Paper, *Development of Governance Standards*.

Philanthropy Australia broadly supports the principles outlined in the Consultation paper and is fully supportive of a principles-based approach to governance rather than a prescriptive approach, taking into consideration the expertise of not-for-profit sector organisations and the considerable work done by peak bodies and individual organisations to develop good governance standards.

General comments on the draft standards

The language used in the draft standards is not always accessible or understandable to the lay person. This is particularly the case with Standards 3 and 5, which are lengthy and complicated. Standards which are principles-based should not require complicated cross-referencing to various regulations and pieces of legislation, nor be complex enough to require extensive and detailed explanatory notes.

In addition, terms such as “responsible entity”, while they have a clear meaning under the ACNC Act, are not clear. Philanthropy Australia staff have observed on a number of occasions, including ACNC community briefings, that there is popular confusion over the term “responsible entity” as popular assumption is that the term “entity” indicates an organisation and not an individual. This is compounded by the use of the term “registered entity” to refer to registered charities and by the use of the word “it” rather than “he or she” or “they” to refer to the responsible entity (for instance in Draft Governance Standard 5).

While the ACNC’s use of the term can be explained in FAQs, footnotes or explanatory memoranda, it is worth noting that extensive and detailed reading and research is often out of reach for the many charities which are run by volunteers from their local community.

Philanthropy Australia believes that the issue of non-member stakeholders is missing from the governance standards and that this is an important omission, given that for the majority of charities which are engaged in service delivery, the non-members who are their clients should be given equal weight as stakeholders.

Finally, Philanthropy Australia recommends that there be consideration to drafting separate standards for trusts. Many of the draft standards are difficult to apply to trusts as the term “responsible entity” could be taken to mean any or all of: the corporate trustee; the directors of the corporate trustee; each individual trustee where there are individual trustees; and any or all of the above where there is a mix of a corporate trustee and a number of individual trustees.

Draft Governance Standard 4: Responsible management of Financial Affairs

There is some confusion around this standard and Philanthropy Australia suggests that it be redrafted to refer to *reasonable* rather than *responsible* management of financial affairs.

Under the Corporations Act 2001 directors are required to exercise their powers and discharge their duties with the degree of care and diligence a reasonable person would exercise”. Trustees of charitable trusts are subject to a duty to exercise “the care, diligence and skill that a prudent person would exercise in managing financial affairs of others”. There is an accepted legal interpretation of the concept “prudent” and also of the concept of reasonableness. Draft Governance Standard 4, however, introduces a concept of “responsible” management and raises the question of whether managing financial resources responsibly is a greater or lesser standard than the requirement to manage them prudently or reasonably.

Philanthropy Australia recommends that the standard be altered and recommends this redrafting suggested by Alice Macdougall of Herbert Smith Freehills:

Standard

(2) A registered entity must manage its financial affairs in a reasonable manner, given its purposes, its size, the extent to which it receives donations, grants and other monies from governments or the public, the risk inherent in the nature of the activities, the vulnerability of those benefiting from the charity’s services and any other relevant factors.

Draft Governance Standard 5: Suitability of Responsible Entities

This standard is extremely onerous in terms of the requirement for charities to perform regular checks and request declarations. This is likely to further increase the existing difficulty for charities in finding suitable board members.

This standard also raises a number of questions for trustees of charitable trusts which are not answered in the explanatory materials.

Firstly, in the case of a trust which has a corporate trustee, the trust is the registered entity but who or what is the responsible entity? Is it the corporate trustee or is it each of the individuals who are directors of the corporate trustee, and when there is both a corporate trustee and individual trustees is there effectively a doubling-up of “responsible entities”?

Secondly, there is an issue for trusts in relation to the removal of a noncompliant responsible entity. If the corporate trustee is the responsible entity, it can hardly take steps to remove itself. If the individual directors are the responsible entities, how can a collective group of individual trustees take steps to remove a noncompliant individual trustee? Under Trust Law this can only be done through referring the matter to the Attorney-General, potentially to the significant financial detriment of the trust.

Philanthropy Australia suggests that this standard be redrafted to include a separate section clarifying how this standard may be applicable to trusts.

Draft Governance Standard 6: Duties of Responsible Entities

Draft Governance Standard 6 has the same issues for trusts as draft governance standard 5 – that there is a difficulty in determining whether the corporate trustee or the individual directors of that corporate trustee are the responsible entities.

Furthermore, Philanthropy Australia believes that there should be an additional duty of responsible entities to be active participants in the governance of the registered entity. This is currently a requirement for Public and Private Ancillary Funds.

Item 2e) of this standard is problematic because the notion of “perceived” conflict of interest is vague and unenforceable (perceived by who?)

Philanthropy Australia recommends that this standard should be redrafted to clarify how this standard could apply to corporate trustees or individual trustees.

Finally, Philanthropy Australia recommends the addition of a requirement to review the charity, such as:

g) from time to time assess the performance of the organisation and the responsible entity against its purpose

Thank you again for the opportunity to provide feedback on the draft Governance Standards.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Louise Walsh', with a large loop at the top and a long tail extending to the right.

Louise Walsh
Chief Executive Officer