

Independent Schools  
Council of Australia

LT010

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Manager  
Philanthropy and Exemptions Unit  
Indirect, Philanthropy and Resource Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Sent by email to: [NFPReform@treasury.gov.au](mailto:NFPReform@treasury.gov.au)

**Re: Submission - Development of NFP Governance Standards – Consultation Paper**

ISCA welcomes the opportunity to make a submission to The Treasury on the Development of Governance Standards for the NFP sector in response to the recently released consultation paper.

The Independent Schools Council of Australia (ISCA) is the peak national body covering the independent schools sector. It comprises the eight State and Territory Associations of Independent Schools (AISs). Through these Associations, ISCA represents a sector with 1,090 schools and 550,000 students, accounting for approximately 16 per cent of Australian school enrolments. ISCA's major role is to bring the unique needs of independent schools to the attention of the Australian Government and to represent the sector on national issues.

Independent schools are a diverse group of non-government schools serving a range of different communities. Many independent schools provide a religious or values-based education. Others promote a particular educational philosophy or interpretation of mainstream education.

Independent schools include:

- Schools affiliated with larger and smaller Christian denominations for example, Anglican, Catholic, Greek Orthodox, Lutheran, Uniting Church, Seventh Day Adventist and Presbyterian schools;
- Non-denominational Christian schools;
- Islamic schools;
- Jewish schools;
- Montessori schools;
- Rudolf Steiner schools;
- Schools constituted under specific Acts of Parliament, such as grammar schools in some states;
- Community schools;

- Indigenous community schools;
- Schools that specialise in meeting the needs of students with disabilities;
- Schools that cater for students at severe educational risk due to a range of social/emotional/behavioural and other risk factors.

Many independent schools have been established by community groups seeking to meet particular needs. Examples include the independent community schools for indigenous students in remote areas, special schools for students with disabilities and boarding schools to educate children from rural and remote areas. There are also schools that seek to reflect the religious values of a particular community or that seek to practice an internationally recognised educational philosophy such as Rudolf Steiner or Montessori schools. Independent Catholic schools are a significant part of the sector, accounting for 10 per cent of the independent sector's enrolments.

Most independent schools are set up and governed independently on an individual school basis. However, some independent schools with common aims and educational philosophies are governed and administered as systems, for example the Lutheran systems. Systemic schools account for 18 per cent of schools in the independent sector.

### **About the Independent School Sector**

Independent schools are not-for-profit institutions that are set up and governed independently on an individual school basis. Independent schools are registered with the relevant state or territory education authority. Boards of governors or committees of management are the key decision-making bodies for most independent schools and are responsible for issues such as a school's educational provision, current and future development and staffing. Unlike other sectors, the majority of independent schools operate autonomously. These schools do not rely on central bureaucracies or bodies and are separately accountable to their parent and school communities.

The steady growth of the independent sector is evidence of the public confidence in the accountability of independent schools through the mix of contribution to education policies, legislative compliance and self-regulation. Independent school enrolments continue to increase because many parents and community groups find that self-governing schools are more accountable to their immediate communities than is possible for schools that are part of large centralised systems.

Individual schools operate in an environment of choice and diversity. The forces that operate in this environment impose an imperative for schools to be aware, innovative and responsive to change in order to ensure schools continue to meet the needs of students and expectations of parents and provide a high quality educational experience for their students.

As noted earlier, independent schools are already highly accountable to their school communities. Independent schools have a greater range of accountabilities than any other type of school in Australia due to the complex mix of their responsibilities to stakeholders, governments, authorities and their legal obligations as incorporated bodies.

In addition to their not-for-profit status, all independent schools are also charitable institutions and as such fall under the auspices of the new Australian Charities and Not-for-profits Commission.

Full details of the regulatory environment for independent schools are provided at Appendix A.

### **School Enrolments and Trends**

The independent school sector is the third largest school education provider in Australia and at secondary level is the second largest provider of schooling services.

Enrolments in independent schools have grown steadily since the 1970s. According to Australian Bureau of Statistics (ABS) data, in 2011 independent schools accounted for 14 per cent of total student enrolments compared to 4 per cent in 1970. Full time enrolments have increased from around 114,000 in 1970 to over 500,000 in 2011. (Note: ABS data excludes independent Catholic enrolments).

### **Development of Governance Standards**

In response to the consultation paper, ISCA has the following comments to make concerning the proposed governance standards.

The consultation paper indicates that the proposed “governance standards are intended to reflect a minimum set of outcomes for registered charities, rather than mandate “best practice governance” or detailed procedures and requirements necessary for effective NFP governance.” This aspect of the standards is supported by ISCA.

In Section 2.3.1 (Scope of the framework) the paper indicates that “entities will need to comply with these standards to become registered with the ACNC and to remain entitled to be registered.” Section 2.3.5 (Breaches of governance standards) contradicts this statement in the opening paragraph which indicates that “a charity would not be expected to demonstrate compliance with all the governance standards upon registering with the ACNC.” This will need to be further clarified by the ACNC.

The paper further indicates in Section 2.3.5 that once a charity is registered with the ACNC, that it will be responsible for assessing its own compliance with the governance standards and that the Commissioner will assume that the registered charity is in compliance with the governance standards unless there is evidence to the contrary. ISCA considers that this is an appropriate way to administer the proposed governance standards in the independent schooling sector, given that the requirements of State Accreditation Authorities as well as State government and Commonwealth government (DEEWR) are already in excess of those being considered in this paper. Schools are already required to comply with very strict governance requirements in satisfying the ongoing accreditation requirements of school registration.

The paper sets out six draft governance standards and requests whether the standard establishes the appropriate principles and whether the wording is appropriate. The six draft standards are:

- Draft standard 1 - Purposes and NFP Character of a Charity
- Draft standard 2 - Accountability to members
- Draft standard 3 - Compliance with Australian laws
- Draft standard 4 - Responsible management of financial affairs
- Draft standard 5 - Suitability of responsible entities
- Draft standard 6 - Duties of responsible entities

For the independent schooling sector, Draft Standard 1 is already a requirement of accreditation as a non-government school. Draft Standards 2 and 3 are also a current operating requirement as all independent schools are required to be properly incorporated entities and so are already complying with these requirements under either ASIC or the State/Territory Offices of Fair Trading.

Draft Standard 4 is already regulated in independent schools through the funding agreements with the Australian Government. DEEWR has a requirement for an annual external audit and through the multi-layered reporting to DEEWR at the Commonwealth level, and to the relevant State government authority, in the areas of finance, student numbers, grant acquittals etc. The proposed “reasonable steps for the responsible management of a charity’s financial affairs” are already well regulated in independent schools, and there should be no concerns with compliance with these proposed first four standards.

It is possible that Draft Standard 5 may have some impact on the capacity to attract voluntary members of the school governing board. While it would seem that the intent of the proposed standard is to protect confidence and ensure public trust in the entity, the process of requiring a school to search the “Disqualified Responsible Entities Register” before being able to appoint a person to the school management board is considered to be onerous and may deter volunteers from offering their expertise to a school.

There is also concern as to privacy issues and to the accuracy of the “Disqualified Responsible Entities Register” as it is indicated that names will only be added to the register when they have been suspended or removed under the ACNC Act. Given that ASIC already maintains a register of disqualified persons, this will mean that the information on the ASIC register will not be available to the NFP sector (or will require a separate search to obtain information that is on the ASIC register as well as a search of the ACNC Disqualified Responsible Entities Register) and that the NFP sector register will only be accurate for “disqualified entities” who have applied to be a responsible entity in a NFP organisation under the ACNC Act. Therefore, the register will be neither accurate nor current and the potential for inappropriate persons to be a “responsible entity” still exists. This will need further clarification by the ACNC.

Draft Standard 6 reflects the provisions of the Corporations Act 2001 and as such are familiar requirements for the directors of incorporated organisations. There are a number of defences (protections) included in the proposed standard including that of the “business judgement rule”. An understanding of the legislated provisions and the defences is included in the large body of precedent at Common Law which exists flowing from the Corporations Act. It will be necessary to educate NFP directors and “responsible entities” of these understandings and of their responsibilities as these provisions have, in the past, largely been the province of “for profit” entities. A large number of directors and “responsible entities” in NFP’s are volunteer and therefore these more onerous provisions, particularly with respect to penalties, may deter qualified people from taking on these roles of responsibility in NFPs.

The consultation paper indicates that there will be “degrees” of how responsible entities will be required to discharge their duties depending upon the size of the registered charity (e.g. a larger entity may be required to do more in discharging their duties than the “responsible entity” of a small charity). This lack of a consistent standard may be confusing for “responsible entities” and management who are involved as volunteers across a number of different sized registered charities. As well, given that there will be penalties attached to non-performance or inadequate performance of responsibility under this standard, a lack of clarity may cause charities to “over perform” for fear of not fulfilling their duties. There needs to be appropriate protection (such as

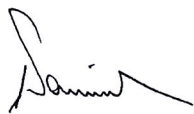
that given in S34 of the Work Health and Safety Act 2011) to remove the possibility of large penalties on volunteer “responsible entities”.

The transitional timing provisions appear to be appropriate for registered charities to make changes to meet the governance standards. However, the ACNC should clarify what action they will be taking for breaches of the governance standards in the provisional period in light of S45-5 of the ACNC Act indicating *“The main consequence of failure to comply with these standards is a loss of the registered entity’s entitlement to registration. If the entity is a federally regulated entity, such a failure to comply may also result in enforcement action under Chapter 4.”*

The establishment of the ACNC and the associated changed compliance requirements for schools will require some considerable adjustment by school management to understand over the coming months. Schools need to be able to make long-term plans and provisions to ensure their ongoing compliance, quality and viability. Schools operate in a dynamic environment which is influenced not only by changing societal expectations, demographics and economic circumstances, but also by changing government policy. The Australian Government’s education reform agenda has had a significant impact on the operations of individual independent schools, including through funding agreements with the Government. Any additional levels of uncertainty or confusion can have a significant impact on the operating environments for independent schools.

ISCA looks forward to further consultation on these initiatives.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bill Daniels', with a long horizontal flourish extending to the right.

Bill Daniels  
**Executive Director**

## REGULATORY ENVIRONMENT FOR INDEPENDENT SCHOOLS

Independent schools have a greater range of accountabilities than any other type of school in Australia due to the complex mix of their responsibilities to stakeholders, governments, authorities and their legal obligations as incorporated bodies.

Independent schools must meet the criteria established by their state or territory government for registration as a school and for their accreditation for credentialing of students. School registration is reviewed on an ongoing basis, which ensures that the school's curriculum and governance complies with state or territory government requirements. State and territory governments provide some funding support for independent schools, and schools must comply with any related conditions of funding as well as reporting and accountability requirements.

The Australian Government is the source of most of the public funding for independent schools. Comprehensive conditions and accountability requirements apply to this funding which are specified in the *Schools Assistance Act 2008*, Schools Assistance Regulations, Administrative Guidelines: Australian Programs for Non-government Schools 2009 to 2012 and the Funding Agreement between the Australian Government and the approved school authority.

Schools are obliged to work co-operatively with their state or territory government to support that government in fulfilling its obligations under the National Education Agreement. Independent schools must also agree to support the achievement of the Melbourne Declaration on Educational Goals for Young Australians and the Council of Australian Governments (COAG) outcomes for schooling. Governments have acknowledged through the Melbourne Declaration on Educational Goals for Young Australians that "Together, all Australian governments commit to working with all school sectors and the broader community to achieve the educational goals for young Australians." One of the action areas for achieving this end articulated in the Declaration is developing stronger partnerships.

Schools must participate in all specified National Student Assessments, participate in the preparation of the National Report on Schooling in Australia, collect and provide extensive information relating to individual students and school information to all organisations specified in the Regulations, including the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) and the Australian Curriculum, Assessment and Reporting Authority (ACARA). Schools are also required to report to parents in compliance with legislated requirements, annually report and publish specified information relating to aspects of the school and its operations and implement the national curriculum.

Independent schools must submit to a Financial Questionnaire to DEEWR annually. The Financial Questionnaire is an annual collection of financial income, expenditure and liabilities from all non-government schools receiving Australian Government general recurrent grants. The Financial Questionnaire data draws on a school's audited financial statements. Schools are also subject to scrutiny of their financial operations including the financial viability and funding sources of the school. Independent schools must demonstrate that the funds received under each Australian Government funding program have been expended appropriately. This includes providing the Australian Government with certificates certified by qualified accountants regarding the expenditure of Australian Government grants. All accounts records and documents as well as free access to each campus of a school must be available to the Auditor-General or DEEWR officers.

Independent schools are bound by a number of other legal requirements associated with their operations. For example, as companies limited by guarantee or as incorporated associations, independent schools are accountable to the Australian Securities and Investments Commission, or to their state or territory registrar of associations. They must submit audited financial statements to these bodies which are available for public scrutiny. They are also subject to regulation by the Australian Taxation Office.

In addition to their not-for-profit status, all independent schools are also charitable institutions and as such fall under the auspices of the new Australian Charities and Not-for-profits Commission.

As employers, independent schools must comply with legislation and regulations covering such issues as occupational health and safety and industrial awards. As educational institutions they must comply with health and safety, privacy and child protection requirements, town planning requirements, human rights and equal opportunities legislation, as well as regulations relating to building and fire codes.

For most independent schools, decision-making takes place at school level through the school board or council and the role of the principal. This imposes far greater accountability to stakeholders at the school level than is the practice in systemic schools. The school board plays a key role in all forms of accountability. The board requires accountability for all the activities of the school, and is itself accountable to the school's immediate stakeholders, to the community at large, and to governments aiding or regulating the operation of the school.

The autonomy of independent schools enables them to respond flexibly to the needs of their local communities and individual students. Individual schools operate in an environment of choice and diversity. The incentives that operate in this environment impose an imperative for schools to be aware, innovative and responsive to change in order to ensure schools continue to meet the needs of students and expectations of parents.

It should be noted that the same conditions and requirements apply to all independent schools irrespective of their level of government funding, and that government funding represents only a portion of the income of independent schools.