

INCENTIVISING RELEVANT CHARITIES TO JOIN THE NATIONAL REDRESS SCHEME FOR CHILD SEXUAL ABUSE – NEW ACNC GOVERNANCE STANDARD

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7 January 2021

Exposure Draft of the Australian Charities and Not-for-Profit Commission Amendment (2021 Measures No 1) Regulation 2021

I acknowledge and respect the bravery of all the survivors of institutional child sexual abuse.

The numerous postings to the Royal Commission into Institutional Responses to Child Sexual Abuse's website (the Royal Commission), by survivors of institutional child sexual abuse, is heartfelt and heartbreaking.¹ Therefore, the Exposure Draft of Governance Standard 6 must accomplish its policy intent - as a valuable social justice tool. The Royal Commission highlighted a multitude of system failings, by not-for-profit entities and government. To avoid additional systematic failings, it is vital that the Redress Scheme and Australia's not-for-profit sector, and its regulator, do not contribute further to a survivor's pain and suffering.

I welcome the opportunity to comment on the Exposure Draft of the Australian Charities and Not-for-Profits Commission Amendment (2021 Measures No 1) Regulation 2021 (ACNC Regulation) Exposure Draft.

I broadly support the Exposure Draft of Governance Standard 6. However, there is concern that the Exposure Draft's aim to compel registered entities to opt-in to the Redress Scheme (to improve sector reputational damage) may undermine the general legal duties owed by the responsible individuals to a registered entity. Thereby, the consequences outlined in the Explanatory Statement to the Exposure Draft for noncompliance may attract judicial attention and review.

¹ See 'Message to Australia' and 'Narratives', *Royal Commission into Institutional Responses to Child Sexual Abuse* <[Message to Australia | Royal Commission into Institutional Responses to Child Sexual Abuse \(childabuseroyalcommission.gov.au\)](https://www.childabuseroyalcommission.gov.au)>.

Introduction and Summary of Submissions

I am a PhD member of the Law Futures Centre at Griffith University, Queensland. I have published and presented on topics relating to the governance of not-for-profit organisations, specifically incorporated associations, domestically and internationally. My published research on not-for-profit governance has been cited by the Western Australian Parliament and in other academic works.² My other published not-for-profit research include a federal takeover of Australia's not-for-profit sector and the introduction of a hybrid not-for-profit structure in Australia.

Summary of Submissions

1. A reference to the Redress Scheme should be included in the heading of Governance Standard 6.
2. Amend Governance Standard 6 includes the word 'protect' to ensure consistency between its policy objects and the *ACNC Act*.
3. There is a concern that Governance Standard 6 in creating an obligation to the sector at large will not override or displace the primary general law and statutory duties and responsibilities of the responsible persons of a registered entity.
4. To overcome this legal and governance concern; a registered entity must be provided with a framework to facilitate and unite a registered entity's purpose to the Redress Scheme principles.

² See Western Australia Parliament, *Second Reading of Associations Incorporation Bill 2014*, Assembly, 20 November 2014, Dr A. D. Buti, 5,7 (p 8532b-8544a); Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: an evaluation' (2017) 45 *Australian Business Law Review* 127-158, Foot notes 111 and 115; Rosemary Teele Langford, 'Conflicts and Coherence in the Charity Sphere: would a conflict by any other name proscribe the same?' (2020) 14 *Journal of Equity* 1, 3 footnote 8; Juliet Chevalier-Watts, *Charity Law: international perspectives* (Routledge, 2018), Chapter 6 'Australia' Footnote 1, page 108.

Governance Standard 6 - Object

- 1.1 The reading of subdivision 45-B (Governance Standard 6), as set out in the Exposure Draft, can only be understood, and interpreted within the context of the National Redress Scheme for Institutional Child Sexual Abuse (the Redress Scheme). The heading of Governance Standard 6 is too general, and it should provide a clear reference to the Redress Scheme.
- 1.2 In referring to the Redress Scheme, it will go some way, to acknowledge the complicity of registered entities' past misconduct. The use of aspirational words in the heading of Governance Standard 6 is paradoxical – owing to the Royal Commission's findings.
- 1.3 Draft Governance Standard 6's object states, 'to maintain and enhance public trust and confidence...'.³ The Explanatory Statement notes that this proposed standard's object 'is linked to the objects of the *ACNC Act*'.⁴ Section 15-5(1)(a) outlines the *ACNC Act*'s objects to be: 'maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector'. Subsection (1) of Governance Standard 6 in the Exposure Draft has omitted one of the key policy objectives of the *ACNC Act*.
- 1.4 The omission of the word 'protect' in the Exposure Draft may be a drafting oversight, which can easily be corrected to ensure consistency between the policy objects of Governance Standard 6 and the *ACNC Act*.
- 1.5 The Redress Scheme and Governance Standard 6 obliges registered entities to accede to the wrongs of the past. For many participating registered entities knowing how to account for past conduct would be outside of the scope and contemplation of a registered entity's mission and purpose.⁵

³ Subdiv 54-30(1).

⁴ The Exposure Draft's Explanatory Statement paragraph 9, page 5.

⁵ See *Federal Commissioner of Taxation v World Investments Ltd* (2008) 236 CLR 204.

- 1.6 The presumption of the Redress Scheme is that a named registered entity will have a demonstratable capacity to pay for redress.⁶ A payment made under the Redress Scheme may be at odds with a registered entity's purpose.
- 1.7 In practice, the diversion of resources and funds away from a participating registered entity's purpose (as payment under the Redress Scheme is not a fine imposed by law or a court decision to pay compensatory damages) may potentially breach Governance Standard 1, be an act of *ultra vires* for the responsible persons,⁷ and outside the contemplation of the relevant governing document/s.⁸ Thereby it may legitimise a registered entity's decision not to opt-in to the Redress Scheme.
- 1.8 A solution to avoid potential consequences associated with a breach of Governance Standard 1 and a registered entity's governing document/s, participating registered entities should amend their mission and purpose statement to include the Redress Scheme.

The addendum statement of purpose may include:

- a. an acknowledgment (which may include an apology) of past wrongs and ongoing suffering committed in the name of the registered entity:⁹
- b. a dedication and commitment to participate in the forms of redress under the Redress Scheme; and
- c. for the National Redress Scheme's duration, the registered entity will extend its purpose to provide resources for the different forms of redress available under the scheme.

⁶ National Redress Scheme, 'Institutions That Have Joined the Scheme' < <https://www.nationalredress.gov.au/institutions/joined-scheme>>.

⁷ For incorporated associations, the doctrine of *ultra vires* has been disposed of by state association legislation. However, these provisions are concerned with the transactions of property and it is doubtful that the courts will remedy a situation where a member does not have the power or capacity to opt into the Redress Scheme through the rules of constructive trust.

⁸ It is highly doubtful that the application of assets *cy-près* would compel a registered entity to opt-in to the Redress Scheme.

⁹ I recognise that an acknowledgement to past institutional sexual abuse is not strictly a not-for-profit purpose or mission. However, in acknowledging the wrongs of the past may be understood by the public as a positive step to restore the sector's damaged reputation.

- 1.9 The addendum statement of purpose should be easily disclosed to the public electronically or in printed form upon request.
- 1.10 Moreover, this addendum statement **must and should not** replace and/or diminish a direct personal response to a redress applicant under the Redress Scheme.
- 1.11 Amending governing documents is timely and burdensome, especially for some registered entities. A cost-effective solution may be for the ACNC provide an undertaking to all the registered entities who have opted-in to the Redress Scheme, not to take reinforcement action for any potential breaches of Governance Standard 1 concerning the Redress Scheme for its duration.
- 1.12 Another possible solution is for a provision to be included in the Exposure Draft that will allow the responsible persons to exercise discretion, in a particular way, that will allow a registered entity to opt-in to the Redress Scheme without breaching the governing instrument and Governance Standard 1.
- 1.13 Concerns remain as to how a participating registered entity accounts for past conduct through the entity's internal governance. In the absence of the Exposure Draft providing any helpful direction or framework, the wording of Governance Standard 6 suggests that a participating 'registered entity's governance' follows the set of five governance standards outlined in subdiv 45-B of the ACNC Regulations.
- 1.14 The set of five governance standards does not provide an adequate structure or direction to support the Exposure Draft's overarching policy objectives. The complexity of the five governance standards and the onerous obligations of Governance Standard 5 as highlighted by Professor Ian Ramsey and Marinda Webster¹⁰ will be further compounded by Governance Standard 6.

¹⁰ Ian Ramsay and Marinda Webster, 'Registered Charities and Governance Standard 5: an evaluation' (2017) 45 *Australian Business Law Review* 127-158.

1.15 It is also worth noting that the initial objective of drafting the set of five governance standards was to prevent financial mismanagement and improve the efficiency of registered entities' internal management. The intent of Governance Standard 6 appears, *prime facie*, to be focused upon addressing particular injustices. Therefore, the set of 5 governance standards are somewhat misaligned with the intent of Governance Standard 6.

Governance Standard 6 – Standard

- 2.1 The term 'reasonable steps' in subsection 2 is a concern. This term can also be found in governance standards 4(2)(b) and 5(2)(b). For Governance Standard 6 to be effective, it is suggested that the term 'reasonable steps' is not subject to the protections found in subdiv 45-C of the ACNC Regulations.
- 2.2 It is arguable that Governance Standard 5 allows for and supports a responsible entity to opt-out of being a participant in the Redress Scheme. The decision to opt-out may be that the responsible persons uphold their general law and/or state statutory duties owed to a registered entity's purpose.
- 2.3 Registered entities and their responsible persons in upholding their general law and/or state statutory duties may conclude that it is not in the registered entity's best interest to participate in the Redress Scheme.¹¹ A registered entity's decision to opt into the Redress Scheme is one of moral consideration; however, the legal imperative of upholding a registered entity's duties and obligations does not readily facilitate this moral and ethical decision.
- 2.4 General law duties and/or state legislative duties are owed to the registered entity and its current members or beneficiaries,¹² not necessarily to the sector. The wording of Governance Standard 6 in attempting to impose an obligation to the whole sector is secondary to the general law and state statutory duties owed in different forms of registered entities. A suggestion is that reference to the sector at large in Standard Governance 6 (1) (and its heading) is omitted and replaced with 'participating non-government institution'.
- 2.5 Upholding legal duties owed to a registered entity, and its purpose is what fosters public trust and confidence in Australia's not-for-profit sector. Governance Standard 6 needs to provide a framework to unite the Redress Scheme's principles to a registered entity's

¹¹ See also Governance Standard 5 (2)(b).

¹² See *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521.

purpose with a responsible person's legal obligations. Uniting the registered entity's purpose and the responsible person's legal obligations may overcome these identifiable legal and governance concerns and provide direction and the necessary legal power for the responsible persons to use a registered entity's funds and resources to pay the compensation under the Redress Scheme.

- 2.6 A general duty of care requires the responsible persons to ensure compliance with regulatory requirements to maintain charitable status. As Associate Professor Rosemary Teele Langford points out, this specific duty is linked to the registered entity's purpose.¹³ Therefore, the Exposure Draft should be amended to allow a registered entity's purpose to be easily changed to join the Redress Scheme.
- 2.7 The penalties outlined in the Explanatory Statement to the Exposure Draft may not discourage some registered entities from opting out of the Redress Scheme. The loss of ACNC registration does not necessarily prohibit some entities from operating and providing services as an unincorporated association.
- 2.8 The penalties are not incentives; however, the penalties are targeted to punish sophisticated registered entities and those who have opted out of the Redress Scheme. Still, the Exposure Draft's Explanatory Statement overlooks those not-for-profit forms that can operate outside the reach of the ACNC. This issue may need further consideration (with state and territory government cooperation) if the Exposure Draft's end goal is for *all* named registered entities to be accountable under the Redress Scheme.

I would be pleased to discuss my submission, or if you would like further information, please do not hesitate to contact me via email at [REDACTED].

¹³ Rosemary Teele Langford, 'Purpose-Based Governance: a new paradigm' (2020) 43(3) *University of New South Wales Law Journal* 945, 964.

