



Governance standards for the not-for-profit sector

NDS welcomes the continued consultation on the governance arrangements for not-for-profit organisations. The perception of inconsistent or inadequate governance standards in not-for-profit organisations—even when incorrect—exacerbates the difficulties organisations face in recruiting voluntary board members. The sector will benefit from improved public confidence in its accountability, probity and performance.

NDS supports the principles-based approach to governance standards, rather than a highly prescriptive approach. The principles-based approach allows for continuous improvement and will be less disruptive on the sector than imposing a set of detailed procedural rules. To assist the not-for-profit sector to strengthen its governance proficiency, NDS is pleased that a substantial educative role is envisaged for the Australian Charities and Not-for-profits Commission (ACNC).

Draft standard 1: Purposes and NFP character of a charity

NDS supports this standard.

To be a charity, an entity must be not-for-profit and have and pursue a charitable purpose. It is reasonable that such an entity is willing to demonstrate this to its members, beneficiaries, employees, donors, volunteers and the public.

Draft standard 2: Accountability to members

Incorporated associations and companies limited by guarantee have members. A governance standard which requires them to be open and accountable to those members is a reasonable requirement.

NDS notes that this standard will provide greater flexibility to companies limited by guarantee, and supports this. Providing that members are given accurate and timely financial information and reports on entities' activities (through annual general meetings and annual reports) and that board elections are held, entities should be allowed to determine exactly how they show they are accountable to members.

It is noted that this standard may increase the administrative burden on incorporated associations in Western Australia—which are currently not required to lodge annual

reports. While the standard does not prescribe how an entity demonstrates that it is accountable and transparent to members, it is likely that the information generally contained in an annual report will need to be provided to its members in some form.

NDS requests that clear guidance materials on accountability to members be made available.

Draft standard 3: Compliance with Australian laws

NDS supports the inclusion of a standard which requires entities to comply with Australian laws.

Draft standard 4: Responsible management of financial affairs

Charities perform important public functions. In recognition of this, they receive a number of concessions under the Australian tax system. In recognition of the important role of charities in Australian society, it is in everyone's interest to ensure that their financial affairs are managed well.

While NDS supports the inclusion of this standard, good guidance materials (produced by the ACNC) will be necessary.

Draft standard 5: Suitability of responsible entities

While NDS supports a standard on the suitability of responsible entities, clarification is sought on who would be considered a responsible entity.

Section 205-30 of the *Australian Charities and Not-for-profits Commission Act 2012* provides a definition of 'responsible entity':

Each of the following is a **responsible entity** of a registered entity:

- (a) in the case of a registered entity that is a company—a director of the registered entity;
- (b) in the case of a registered entity that is a trust—each of the following:
 - (i) a trustee of the registered entity;
 - (ii) if a trustee of the registered entity is a body corporate—a director of the trustee;
- (c) a person who is any of the following:
 - (i) a trustee in bankruptcy of the registered entity;
 - (ii) a receiver, or receiver and manager, of the property of the registered entity;
 - (iii) an administrator of the registered entity;

- (iv) an administrator of a deed of company arrangement executed by the registered entity;
- (v) a liquidator of the registered entity;
- (vi) a trustee or other entity administering a compromise or arrangement made between the registered entity and someone else.

This appears to exclude any staff member of a charity, which is contrary to the approach taken by the *Corporations Act 2001* which defines (and places obligations on) an officer:

"officer" of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
 - (ii) who has the capacity to affect significantly the entity's financial standing.

NDS would like clarification as to whether senior staff members of a charity that is a company limited by guarantee (particularly the CEO but possibly others) will be treated as 'responsible entities' or not. If they are not treated as responsible entities, what will be their obligations (if any) under the *Corporation Act 2001*?

Draft standard 6: Duties of responsible entities

The interaction of this governance standard with requirements of state and territory regulations poses considerable challenges. Where different requirements are detailed, it is unclear how a responsible entity should act.

For instance, the *Australian Charities and Not-for-profits Act 2012* states:

45.30 Standard 6—duties of responsible entities

...

Standard

- (2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:

...

- (e) **to disclose perceived or actual material conflicts of interest of the responsible entity:**

...

Note 1 This standard sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2 Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3 For paragraph (2) (e), a perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

In contrast (for example), the Victorian *Associations Incorporation Reform Bill 2011* states:

80 Disclosure of material personal interest

- (1) A member of the committee of an incorporated association who has a material personal interest in a matter being considered at a committee meeting must, as soon as the member becomes aware of his or her interest in the matter, disclose the nature and extent of that interest to the committee.

Penalty: 10 penalty units.

...

81 Matter on which committee member has material personal interest

- (2) A member of the committee of an incorporated association who has a material personal interest in a matter being considered at a committee meeting **must not—**

(a) be present while the matter is being considered at the meeting;

or

(b) vote on the matter.

Penalty: 10 penalty units.

The response required under each Act is different; and, importantly, 'material personal interest' is not defined in either Act.

It can be expected that a significant number of differences in the duties of responsible entities (or equivalent) exist between the *Australian Charities and Not-for-profits Act 2012* and the Acts regulating incorporated associations across the jurisdictions. Where differences exist for entities that will have dual regulatory requirements, clear guidance materials will be required.

NDS is pleased to see the proposal that a number of protections for responsibly entities (as outlined in the consultation paper) will be detailed in legislation.

Many charities rely on the voluntary contribution of expertise and time of people who agree to serve as board members of companies limited by guarantee or committee members of incorporated associations. NDS is pleased to see that it is proposed that being a **volunteer** responsible entity would be considered a factor in determining the scope of their duty. Details on this are requested.

In earlier consultations it was suggested that the personal skills of a particular responsible entity would be a factor in determining the scope of their duty: for instance, a responsible entity with accounting qualifications would be held to a higher degree of accountability in making financial decisions than people without such qualifications. This issue has not been raised in this consultation paper and it is a matter on which NDS seeks further explanation.

February 2013

Contact: Dr Ken Baker
Chief Executive
National Disability Services
Ph: 02 6283 3200
ken.baker@nds.org.au

About National Disability Services

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes about 800 not-for-profit organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.