



**Aged & Community
Services • Australia**

SUBMISSION TO THE TREASURY

REVIEW OF NOT-FOR-PROFIT GOVERNANCE ARRANGEMENTS - CONSULTATION PAPER

JANUARY 2012

Aged and Community Services Australia (ACSA) is the national peak body for aged and community care providers representing over 1,100 faith based, charitable and community-based organisations that provide residential and community aged care services, housing and supported accommodation to almost 1 million older people, younger people with a disability and their carers.

ACSA welcomes the opportunity to comment on the Consultation Paper (the Paper) on behalf of its members.

Overview

ACSA supports the government's underlying intention in its announced package of not-for-profit (NFP) reforms to reduce red tape and 'make it easier for the NFP sector to deliver ... services for the public benefit'. However, the Treasury Paper gives no evidence of any problems that would warrant the sort of detailed legislative and regulatory response that is being proposed. Indeed, the Assistant Treasury acknowledges that most NFPs have effective governance policies in place and only some do not. It seems therefore that the proposed extent of the reforms is designed to deal with just those few at the expense of the vast majority.

While ACSA agrees with the findings of the *Final Report of the Scoping Study for a Not-for-profit Regulator* (the Final Report) that governance requirements across Australian jurisdictions can be 'duplicative, burdensome and unclear', the solution need not necessarily involve a centralised system of uniform governance requirements. The Paper fails to make a case for a new regulatory regime for governance in the NFP sector, particularly not for aged care, disability and health service providers.

As stated in the Introduction to the Paper, the Final Report found that a principles-based approach to governance would largely be welcomed by the NFP sector. ACSA supports such an approach, which would establish the principal role of the Australian Charities and Not-for-profits Commission (ACNC) as one of education and encouragement of best practice.

Contrary to this, the Paper's proposals stray into a level of prescription and administrative detail that go beyond what we would see as being consistent with a principles-based approach to ensuring good governance in the not-for-profit sector (as promoted in the *Final Report of the Scoping Study for a National Not-for-profit Regulator*). As acknowledged in the Paper, 'Most NFP entities will already have adequate governance procedures in place'. This is particularly true of the aged care, health and disability sectors, which have existed in Australia for many decades and now represent a large proportion of the NFP sector. These sectors are also very heavily regulated and subject to quite intense ongoing scrutiny by a range of Federal and State authorities, to the extent that the Productivity Commission has formed the view that the degree of regulation in aged care has become burdensome and misdirected. The sectors are already highly transparent and accountable.

The Paper fails to recognise the existing regulatory systems that involve requirements for accreditation and ongoing performance monitoring, with user rights provisions and complex complaints handling mechanisms. ACSA might support the government's intention to establish a single, national regulator but given that a major government objective in establishing the ACNC is to make it easier for the NFP sector to deliver their services, the benefits of centralising and standardising governance arrangements have yet to be demonstrated. Many of our members, particularly church based entities, have corporate structures and accountability arrangements that are quite different to, but no less effective or accountable than, those that apply to incorporated associations. To impose a 'one size fits all' solution therefore would create a burdensome transition process without any gain. ACSA would be looking for a reduction in and streamlining of regulation in

the NFP sector and an enabling role for the ACNC, consistent with the 'risk-based and proportionate' approach adopted in the United Kingdom.

The Paper does not recognise the particular needs of and difficulties faced by services in regional and remote Australia. Many ACSA members in these areas are often battling poor internet access for example. Governance requirements therefore need to be sufficiently flexible as to not impose an unacceptable burden on organisations that are unable to make use of an online environment.

ACSA would welcome the opportunity to assist the ACNC in the introduction of new governance arrangements in the aged care sector, to the extent that they are necessary.

The Consultation Questions

In the context of the above ACSA position, responses to the individual consultation questions are as follows:

Responsible Individuals

1. Prescribing a list of parties that a responsible individual must consider when exercising their duties would be problematic. As the Paper recognises, NFPs may be responsible, directly or indirectly, to many (varying) parties. However, not all NFP entities will have donors or members and 'the public at large' is a rather nebulous concept. ACSA recommends that examples of interested parties be included in guidelines rather than in legislation but that NFPs be required to be clear in their governance policies as to whom they owe duties to.
2. The particular parties that a responsible individual needs to consider will depend on the objects of the organisation. Referencing them in an organisation's purpose or mission and being clear in governance policies should be more than sufficient.
3. The duties outlined on page 17 of the Paper (paras. 91 – 96) seem sufficiently high level yet comprehensive.
4. The minimum standards of care in complying with any duty are reflected in various sections of the Paper (but in particular, paras. 90 – 96). They include:
 - a. Acting in good faith in the best interests of the entity;
 - b. Not to misuse their position or information and to disclose material personal interests
 - c. Understanding their role and legal duties;
 - d. Being honest and careful in their dealings;
 - e. Exercise diligence and reasonable care and skill (equivalent to that of a prudent person).
The same standards should apply equally to employees and volunteers; to professionals and to lay persons, if they have equivalent duties.
5. Responsible individuals should not be required to hold particular qualifications. In small, relatively uncomplicated organisations for example, responsible individuals may be perfectly capable of carrying out their duties in a responsible manner and unlikely to need particular qualifications to do so. Each organisation should be responsible for determining what experience and skills are required by each responsible individual. In certain circumstances they may require particular qualifications but this should be a matter for the organisation.
6. No (see 5. above).
7. Standardising the duties of responsible individuals would be helpful if they are kept at a sufficiently high (strategic) level and as statements of principle. They should be clear enough to be meaningful to the parties to whom the individuals owe duties but not so complicated as to lack relevance to small, single purpose organisations.
8. As stated at 4. above, the requirements on volunteers should be the same as for employees, provided they fit the definition of a responsible individual as outlined at para. 85 in the Paper.

9. ACSA agrees that the level of risk to parties to which an NFP owes a duty is not related to its size per se but is relative to the nature of its activities, its level of government support, its turnover, use of volunteers, potential for corruption etc. The standard of care should therefore be relatively the same across all organisations but ACSA supports the proportional reporting requirements in the draft ACNC Bill. It seems reasonable that reporting should vary according to an organisation's annual revenue.
10. The Corporations Act and requirements applying to incorporated associations are similar and both already provide a good basis for the core duties of responsible individuals.

Disclosure and conflict of interest

11. The Paper mentions that 'tiered/proportional reporting requirements are currently being introduced and will be consulted on as part of the ACNC legislation' (para. 107). As stated above, ACSA agrees with the proposed proportional reporting requirements. In terms of what information entities should be required to disclose, again, the Corporations Act and requirements applying to incorporated associations provide good guidance for the ACNC.
12. ACSA is not aware of any overseas examples of a requirement to disclose the remuneration of responsible individuals, other than for listed companies, and in some cases, public service executives. ACSA does not support the disclosure of the remuneration of individuals in NFPs but agrees that global figures should form part of the reporting requirements. Similar to the annual reporting of salaries in the Australian Public Service, whereby Departments provide aggregate information about the numbers of employees in each classification level, NFPs could report the total remuneration of all responsible individuals, but not individual remuneration.
13. ACSA supports the suggested criteria in relation to conflict of interest.
14. ACSA has no comment on situations involving related parties.
15. ACSA supports the use of the implied meaning in the Corporations Act of 'material' in relation to personal interest as being something of some substance or value as opposed to merely a slight interest. There is no need for new governance stipulations.

Risk management

16. The Community Care Common Standards contain an Expected Outcome requiring aged care providers to have adequate risk management plans and strategies in place. Similarly, the accreditation standards applying to residential aged care will soon have a risk management requirement. Neither of these is acknowledged in the Paper. Guidance on good risk management, and how to consciously implement a risk management approach, could be provided by the ACNC, rather than imposing new and additional requirements that may or may not be adequate to the context of the organisation's operations. The approach in the UK (as per para 176 of the Paper) is adequate.
17. The Department of Health and Ageing (DoHA) has recently commenced the introduction of revised prudential requirements for aged care providers holding accommodation bonds. The revised requirements involve four prudential standards: governance, liquidity, disclosure and records. The standards require aged care providers to have an Investment Management Strategy and a Liquidity Management Strategy that comply with certain minimum requirements.
18. Minimum insurance requirements would be difficult to mandate other than in a general sense. ACSA strongly supports a principles-based approach to this and other governance matters, which in this case would simply require entities to have adequate insurance coverage, as determined by individual entities. The ACNC could provide useful guidance on the subject of insurance to help ensure that all NFPs are aware of the range of coverage considered necessary.
19. The need for indemnity insurance is self-evident and already an accreditation requirement for aged care providers, albeit perhaps indirectly.

Reviews

20. Review requirements are already well covered by existing arrangements in aged care.

Governing rules

21 – 24. Again, existing arrangements in the aged care sector are more than adequate. The ACNC might have an educative/guiding role in relation to the development of governing rules. The ACNC should only be responsible for determining an entity's eligibility for registration and for monitoring its ongoing compliance with registration requirements, with respect to this section.

Relationship with members

26 – 28. Any mandating of rules governing an entity's relationship with members should be kept to an absolute minimum so as to not infringe on the rights of entities and members to determine their own governance arrangements. Again, ACSA is of the view that this is a matter of providing principles based guidance rather than of law.

Summary issues

29. As mentioned above, smaller/rural/remote organisations usually need additional assistance in understanding new arrangements and requirements, or even in relation to existing requirements, given that membership of boards and staffing change over time. ACSA sees this as the ACNC's primary role.
30. At a very minimum, to ensure that standardised requirements lead to a reduction in red tape, the government should not introduce any new requirements unless they replace an existing one. ACSA favours the use of existing national corporations' law and/or a standardised set of requirements applying to incorporated associations.

ACSA Summary

While we have commented on the individual consultation questions we return to the point made in the Overview that the Paper fails to make a case for major governance reform in the case of the majority of the NFP sector. To a very large extent, the desired level of transparency and accountability already exists in the aged care and other sectors. Any changes should therefore be minimal and must pass the test of reduced red tape in every respect.

ACSA supports the objective of greater consistency in governance requirements across jurisdictions and is willing to assist the ACNC in an educative, guiding role to encourage best practice in governance. At this stage however, we stop short of agreeing to a centralised system of new uniform requirements. While the NFP sector is very broad and we accept there may be some concerns about small sections, we are yet to be convinced that there are any major problems to be solved in the aged care sector and that to the extent that any might exist, the government's current proposals for completely new governance arrangements are not the answer.

In the case of organisations in rural and remote locations, governance requirements and administration need to recognise that these organisations often have quite poor internet provision.