



AUSTRALIAN DENTAL
ASSOCIATION INC.

Australian Dental Association Inc.

**Review of not-for-profit governance arrangements Consultation Paper
Submission**

Department of the Treasury

20 January 2012

**Authorised by
Dr F Shane Fryer
Federal President**

**Australian Dental Association Inc.
14–16 Chandos Street
St Leonards NSW 2065
PO Box 520
St Leonards NSW 1590
Tel: (02) 9906 4412
Fax: (02) 9906 4676
Email: adainc@ada.org.au
Website: www.ada.org.au**



Review of not-for-profit governance arrangements Consultation Paper Submission

1. About the Australian Dental Association Inc.

The Australian Dental Association Inc. (ADA) is the peak national professional body representing about 13,600 registered dentists engaged in clinical practice and student dentists. ADA members work in both the public and private sectors. The ADA represents the vast majority of dental care providers.

The primary objectives of the ADA are to:

- Encourage the improvement of the oral and general health of the public and to advance and promote the ethics, art and science of dentistry; and
- To support members of the Association in enhancing their ability to provide safe, high quality professional oral healthcare.

There are ADA Branches in all States and Territories other than in the ACT, with individual dentists belonging to both their home Branch and the national body. Further information on the activities of the ADA and its Branches can be found at www.ada.org.au.

2. Introduction

The ADA welcomes the opportunity to provide comment on the Assistant Treasurer's Consultation Paper *Review of not-for-profit governance arrangements* (the Consultation Paper). The Consultation Paper seeks to review the governance obligations appropriate for registered not-for-profits (NFPs) (regardless of entity type), taking account of the findings of the *Final report of the Scoping Study of a national NFP Regulator*.

It is noted that Government intends to centralise, via the Australian Charities and not-for-profits Commission (ACNC), the organisational governance requirements for NFP entities. The comments below are framed in responses to questions raised by the Consultation Paper. The ADA's comments are based on consultations with its members and Branches.

We trust the ADA's comments provide a constructive contribution to the further refinement and implementation of the ACNC.



3. Executive Summary

Overall, the ADA agrees with the nature and thrust of the Consultation Paper, particularly when it sets the “Context” for the review that is to occur to this sector. The ADA agrees that the major areas of significance in the Review will need to deal with issues relating to:

- Duties and minimum standards of responsible individuals, including rules for proper organisational management and running of the entity;
- Disclosure requirements and managing conflicts of interest;
- Risk management procedures;
- Internal and external reviews and auditing requirements;
- The coverage of the minimum requirements of governing rules; and
- Relationships with members.

A general concern the ADA has with the Consultation Paper is that it may not adequately address the sector of NFPs in which the ADA engages – namely that of the “Professional Association.” Professional associations (PAs) operate in a very distinct area of the NFP sector and as such need to be specifically addressed.

The ADA for instance in its Constitution states that its primary objectives are:

“To encourage the improvement of the oral and general health of the public and to advance and promote the ethics, art and science of dentistry.

To support members of the Association in enhancing their ability to provide safe, high quality professional oral healthcare.”

These objects represent a mixture of purposes that are for the general public good while at the same time requiring the organisation to meet the specific needs of its membership in delivering high-quality care to the public. Most NFP entities have, as the Consultation Paper recognises, donors, beneficiaries, volunteers, government, and members. PAs by and large only have members and the function of the PA is to provide service/assistance/guidance to the members and in so doing assist in the delivery of services for the public good. It would be rare for a PA to have donors and clearly identifiable beneficiaries outside its membership.

Where possible, mention is made in our response as to how this sector may need to be addressed. In general, the comments made in each section of this response have application to all parts of the NFP sector, including PAs.

4. Discussion

a. Responsible individuals' duties

1. **Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?**

The ADA agrees this should be considered. These requirements would ideally be set out in the constitution/governing rules of the entity. For instance, in the case of the ADA, the duties would be owed firstly to the members and then consequently to the public at large. Legislation should insist that in any NFP the identity of the persons or class of persons to whom duties are owed is set out clearly in its governing rules.

2. **Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?**

Again, the ADA would suggest that the answer to this question should be addressed in the entity's governing rules. The constitution of the entity should clearly identify its objects and set in place how those engaged within the entity will exercise their duties and roles. Activities of the entity would be clearly defined and provide direction to those involved with the entity as to what they must do to achieve the objects of the NFP organisation.

3. **What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?**

See responses to 1 and 2 above. The ADA supports the principles and discussion of these points in section 6.1 of the Consultation Paper.

4. **What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?**

The ADA agrees that a minimum standard needs to be adopted and that the standard reflects what exists in the for-profit sector as set in the Corporations Law.

If someone is to assume the roles and responsibilities of a responsible person in a NFP entity, they must have an obligation imposed on them to exercise the same level of care and responsibility as required of an equivalent person in a for-profit body. The ADA cannot find a reason to require the level of care should vary on the basis of whether that person is acting in a large or small entity, or in a paid or non-paid capacity. All responsible persons must ensure the interests of the entity are protected and the objects of the entity addressed.

5. **Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?**

While the ADA would support encouraging responsible persons to pursue particular formal qualifications that assist them perform their role, it does not think that prescription of this is necessary in this sector.

It will be the role of the governing body of the entity to ensure that the responsible persons appointed carry the requisite skills needed to fulfil their role. The ADA recognises that skills can be learnt equally well through education and/or experience and does not see formal qualifications as essential.



Review of not-for-profit governance arrangements Consultation Paper Submission

The board of the governing body is probably best placed to make operational decisions on which persons are suitable and qualified to perform the tasks that they are assigned.

6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?

An obligation to meet the objects of the NFP body should apply to all responsible individuals. All such persons should have this as their primary objective. The ability to deliver on this will vary from role to role within the organisation but the overriding duty should exist for all responsible persons.

In the for-profit sector, the company and those performing within it must have the interests of shareholders as the primary object. The same must apply in the NFP sector, and that is to act in the primary interests of those for which the NFP organisation was established.

7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?

The ADA has raised the issue as to whether the Consultation Paper has adequately accounted for the specific nature of PAs within the NFP sector. If an account of this sector is provided then the ADA sees no problems with standardisation of duties.

8. Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?

By and large it is up to the NFP entities themselves to outline the position and duty statements for which they employ persons to perform within the organisation. An NFP entity, through its governing body, is best placed to determine what responsibilities should be attached to the roles it establishes. As long as it is made plain to the responsible person appointed and there are review frameworks in place ensuring on-going compliance, then that should suffice.

Again, the ADA sees no reason to differentiate between the roles of the volunteer and those who are paid persons – both equally carry the burden of ensuring that they act in the interests of the entity and its objects.

9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?

The ADA would feel that the creation of higher levels of minimum standards would be fraught with problems. What may be a “higher risk NFP” would be difficult to determine and perhaps only create confusion.

If all responsible persons are required to exercise a minimum standard of care - such as the exercise of reasonable care in the circumstances of the NFP entity - then the ADA feels that this should suffice. The exercise of care required in the administration of a multimillion dollar NFP enterprise to ensure safe investment of funds should be the same as the equivalent obligation on the smaller entity. The obligation will be to invest the funds in a way that will best deliver the objects of the NFP. Each case will be different and the nature of investments may differ but the overriding obligation and standard of care should be the same.

Review of not-for-profit governance arrangements Consultation Paper Submission

Corporations Law in Australia sets out uniform standards and obligations and does not differentiate on standards based on size or risk. A uniform set of obligations and responsibilities exist for all – the same should apply in the NFP sector.

- 10. Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?**

In a similar vein to the response to question 9, the ADA recommends government adoption of the core duties and obligations based on the Corporations Law.

b. Disclosure requirements and managing conflicts of interest

- 11. What information should registered entities be required to disclose to ensure good governance procedures are in place?**

The ADA considers the information set out in paragraphs 105-120 address the various issues that need to be disclosed.

- 12. Should the remuneration (if any) of responsible individuals be required to be disclosed?**

The ADA does not consider this to be necessary. Existing Corporations Law in the for-profit sector has requirements in place that deal with this issue and the ADA considers these requirements to be sufficient. These balance obligations to shareholders/investors/those with vested interests and the individual's right to privacy. In an effort to avoid duplication and red tape, the ADA considers the Corporations Law's requirements suffice.

Remuneration levels of responsible individuals should be the role of the governing body. Different situations will require different requirements. If occasion arises where it may be revealed that a responsible person is remunerated at too high a percentage of funds retained by the NFP, then that would be a matter to be addressed by the governing body. It would be the governing body's role to deal with this.

- 13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?**

Conflict of interest is an important and difficult area to administer in the NFP sector. The sensitivities of those involved, particularly volunteers are often aggravated when the potential for conflicts of interests arise. Reality and perceptions of conflicts of interests have to be addressed. Perceptions of conflict of interest are difficult to manage but must be addressed to ensure the comfort of all participants in a NFP entity.

The criteria as outlined in the Corporations Act should be adopted. There is a substantial body of case law associated with this legislation that the ADA considers adequately deals with this matter.

- 14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?**

The ADA considers the general law is adequate.

Review of not-for-profit governance arrangements Consultation Paper Submission

- 15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of ‘material personal interest’?**

The ADA would agree that this issue needs to be addressed. As stated above, the Corporations Act and associated legislation adequately deals with the issue.

A register of conflicts of interests from responsible persons should be maintained by each entity.

c. Risk management

- 16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?**

Adequate systems for accounting for funds must be available to donors.

While funds donated by the public may hold a special place because donations are given with the purpose of enabling the entity to deliver on its objects (compared to shareholders’ funds in a for-profit enterprise), much the same nature of accounting for the use of the funds and reporting on the funds should exist.

- 17. Should particular requirements (for example, an investment strategy) be mandated or broad requirements for NFPs to ensure they have adequate procedures in place?**

Each scenario for a NFP may differ. In some cases monies received may be intended to be made immediately available to recipients to assist them in overcoming the impact of some natural disaster. On the other hand, another NFP may have a more long-term goal as its objective and investment strategies to meet those goals are needed to both provide some immediate delivery of a service yet at the same time preserve capital for on-going operations.

If broad requirements are to be created then they must take adequate account of what it is the NFP is seeking to achieve. The governing body needs to determine the optimum strategy to allow the NFP entity to achieve its objectives and ensure they are implemented. The governing body members, being responsible persons, must address their duties to the organisation and ensure that appropriate safety and security of investment options are adopted that are compatible with the entity’s objects.

- 18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?**

Each situation must be considered individually. No mandating should be imposed. It should be for each individual governing body to determine the necessity for insurance. Adequate protections exist under the Corporations Law to deal with abuses or neglect by members of the governing body.

- 19. Should responsible individuals generally be required to have indemnity insurance?**

The ADA would again state that each case has to be looked at on its merits. Insurance provides a safeguard but at a cost. A cost-benefit analysis should be taken in each case.



Review of not-for-profit governance arrangements Consultation Paper Submission

Neither the NFP or for-profit sector should not be obligated to expend money on insurance premiums for policies that may never require a claim to be made.

Each governing body needs to determine its own requirements and in fulfilling their governing role be responsible for decisions regarding the need for insurance coverage.

d. Internal and external reviews

20. What internal review procedures should be mandated?

The ADA has reviewed paragraphs 138-151 of the Paper and has nothing significant to add.

As has been stated consistently throughout its response to the Consultation Paper, each entity must put in place procedures that meet its specific needs and allows fulfilment of the entity's objectives. These will differ from case to case. Each entity's governing body must make the determination that suits its objectives.

e. Minimum requirements for an entity's governing rules

21. What are the core minimum requirements that registered entities should be required to include in their governing rules?

The ADA has reviewed paragraphs 138-160 of the paper and has nothing significant to add. Ensuring the ability to respond to the needs of the constituents of the NFP, balanced against the needs for transparency and effectiveness, are essential in the creation of whatever framework is created. The gist of the comments made in this section of the Consultation Paper identifies the need for national consistency and for the entity's governing rules to be responsive to the NFP's operations. The ADA supports this.

22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?

The ADA would have no objection to this provided appropriate restraints upon the ACNC were put in place. It does not consider that the ACNC should have an unfettered right to mandate requirements to protect the mission of the entity and the interests of the public. To do so would restrain an entity from pursuing activities in a fashion that it wished to adopt and which might be acceptable to the public. To allow the ACNC to mandate requirements would allow them to impose their will and outlook, possibly prompting projects that may be more conventional and safe; when in fact a particular NFP and the public may wish to pursue a more high risk high/high success approach.

The governing body should determine the approach to be taken to pursue its mission; provided disclosure of the mission and methodology to be adopted in pursuing the mission are disclosed then it is up to the member or donor to determine for themselves if they wish to participate.

Review of not-for-profit governance arrangements Consultation Paper Submission

Those in the NFP are perhaps best equipped to truly determine the efficacy of their mission and actions. This is not to suggest there should be no transparency at all, but that judgments should not be made by the ACNC without both full and adequate consideration of the context in which an NFP operates or of the views of those within these organisations.

23. Who should be able to enforce the rules?

The ACNC should be the regulator of the sector in the first instance.

24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind up or deregistration?

Yes – but with strict limitations imposed.

Freedom in selection of missions and ways to deliver those missions should rest with the NFP. Only where flagrant breaches of corporate responsibility are reported and established by the ACNC should it have any ability to enforce change within the NFP.

25. Should model rules be used?

Yes – as an option for the NFP to adopt if it considers those model rules meet its objectives. Such rules will simplify the setting up of NFPs and thus result in savings. If model rules are adopted they need to be:

- Generic to enable them to meet the individual circumstances of the NFP; and
- Include options that will enable the rules to meet common objectives of NFPs.

f. Relationships with members

26. What governance rules should be mandated relating to an entity's relationship with its members?

Paragraphs 161-168 of the Paper seem to address the major issues here. Rules exist under the Corporations Law and these would appear to suffice for adoption in the NFP sector.

27. Do any of the requirements for relationships with members need to apply to non-membership based entities?

Yes, as required above in question 26.

28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?

The ADA agrees with this and suggests adoption of requirements consistent with the Corporations Law. It is essential that all organisations report to constituents at least on an annual basis. Not only does this enable members to be informed in detail of the entity's operations but in preparing for that report, it requires the entity itself to focus upon how well it has or has not achieved its ambitions and mandate.



g. Summary

29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?

Considering the plethora of different types of NFPs, the varying structures and operational practises that exist, the ADA recommends the ACNC not be too prescriptive in its governance framework. As a starting point, developing a set of general principles for the governance framework is suggested.

Review could then follow in consultation with NFPs.

The ADA also recommends that educational materials about “best practice” models and arrangements be provided by the ACNC.

30. How can we ensure that these standardised principles based governance requirements being administered by the one stop shop regulator will lead to a reduction in red tape for NFPs?

There can be no assurance. The proof will be in the implementation. If the ACNC is true to the objectives as set out in the “Context” section of the Consultation Paper, then success is likely.

31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?

Principles that encompass the objectives sought to be achieved as set out in the “Context” section of the Paper would be suitable. The ACNC approach should mirror the Corporations Law; however, allowance must be made for the particular arrangements and practices of each individual NFP and in particular Professional Associations.

32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?

The ADA has attempted throughout its responses to provide responses that will be generic to all NFPs. Indigenous NFPs are one class of NFPs that must be considered but in much the same way as any specific purpose NFP must be catered for. Each NFP, including indigenous NFPs, will have challenges to overcome. Flexibility in how to best respond must be incorporated.

Thank you for the opportunity to respond.

Dr F Shane Fryer

President

Australian Dental Association Inc.

20 January 2012.