

27 January 2012

Manager, Philanthropy and Exemptions Unit  
Personal and Retirement Income Division  
The Treasury  
Langton Crescent  
PARKES ACT 2601

To: NFPReform@treasury.gov.au

### **Consultation Paper: Review of not-for-profit governance arrangements**

Dear Sir.

Thank you for the opportunity to comment on the proposed governance arrangements for the not-for-profit sector.

I am an accounting academic employed by Charles Sturt University nearing completion of my PhD into accountability reporting by social service organisations. I am currently a director of two not-for-profit companies in the Central Tablelands area and am a graduate member of the Australian Institute of Company Directors. The views expressed are my own and not necessarily those of my employer.

#### **General comments**

I strongly support the intent of the government to strengthen governance in the NFP sector, and particularly the introduction of the ACNC. However, I do have concerns as to how the arrangements will be implemented and how they will interact with current arrangements for existing entities. The exposure draft states that the ACNC legislation will at first only apply to charities, but has the long term intention of drawing in other not for profits. There are also numerous entities such as co-operatives and incorporated associations subject to state-based legislation which are subject to governance arrangements under those provisions. I believe there will be substantial double up if governance arrangements are legislated for charities, without agreements from the states relating to incorporated associations and co-operatives in particular. It would be far better that the legislation and reporting requirements underlying incorporated associations, co-operatives, companies limited by guarantee, etc were harmonised with the agreement of the states. In the short term what not-for-profits that fall outside the ACNC legislation will have differing requirements from charities.

I believe encouraging the adoption of governance principles for charities may result in better outcomes than regulation and increased compliance.

With the above in mind I have answered consultation questions as follows:

## Consultation questions

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

Some indicative stakeholders may be useful as a guide, but the range of different types of charities as well as stakeholders makes legislating this impossible and the responsible individuals with the organisation itself should determine who they owe a duty of care to.

### 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?**

All of the above plus many more including government and corporate funders, religious affiliations, neighbours depending upon the organisation's mission and purpose.

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

The duties should be principles based and similar to the duties of offices contained in the Corporations Act.

### 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?**

It should be based on 'reasonable care' and dependent upon an individual's duties and experience, similar to directors duties under the Corporations Act.

### 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)?**

Responsible individuals should have certain skills or experience but this should be guided by principles and organisational direction, as is the case currently with company directors, not legislated.

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

No minimum standards should be legislated.

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

There are huge issues in trying to standardise across the huge diversity of not-for-profit organisations. Duties should be principles based and not be mandated with specific rules and regulations.

**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?**

No

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

Yes, but this should be determined by individual circumstances and based on principles, not by specific legislation where it will be very difficult to define 'higher risk'.

**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?**

The core duties should be based on the Corporations Act, however many of the ASX corporate governance guidelines are applicable to charities and would also be a useful starting point to look at.

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

Accounting standards, fundraising, and reporting service performance information should be enshrined elsewhere, not in governance legislation. Disclosure of remuneration and other governance information should be on more onerous than the Corporations Act.

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

No, this is excessive and may also drive up remuneration paid to key personnel if disclosed.

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

No, conflicts of interest are adequately covered under the Corporations Act and requirements should not be higher for charities.

**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)?**

No, these conflicts would appear to be adequately caught by existing Corporations Act requirements.

**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'?**

Based on Corporations Act which has been well tested and defined at common law.

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

NFPs should be accountable for use of funds, and also for ensuring appropriate systems of control are implemented with the organisation. It is to be noted not all not-for-profits solicit funds from the public so the requirements here should be proportional.

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

No, there should be no difference to for-profit organisations in this regard.

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

It should be recommended, but for small organisations in particular this may be impractical due to cost implications or inability to gain coverage.

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

It should be recommended, but for small organisations in particular this is impractical due to cost or inability to gain coverage.

**20. What internal review procedures should be mandated?**

None, except for reporting requirements based on tiered reporting

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

Non-distribution constraint when company is operating and also at winding up.

**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?**

Yes, a minimum set of requirements which should be codified in model constitution and replace rules similar to the Corporations Act.

**23. Who should be able to enforce the rules?**

ACNC and members

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

Yes, if the ACNC is responsible for the legislation under which the entity is incorporated.

**25. Should model rules be used?**

Model rules should be offered as guidelines.

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

A model constitution is supported but, membership based rules should not be legislated by ACNC but should depend upon legislation governing type of organisation concerned eg Corporations Act, Co-operatives legislation etc as membership arrangements are dependent upon the type of company.

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

No

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

Recording and maintaining of minutes should be compulsory and all entities should have at least an AGM each year.

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

Additional governance support would be useful for many NFPs. This should be based on principles and education, not mandatory legislation.

**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?**

This will be extremely difficult to achieve unless the legislative requirements underpinning all types of not-for-profits is harmonised with co-operation from the states. It is likely that any additional requirements determined by the ACNC will result in more red tape for not-for-profit organisations, not less.

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

Most of the principles covered in the exposure draft would be useful in guidance materials.

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

No comment

**33. Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?**

Consider a new form of organisational structure amalgamating companies limited by guaranteed, incorporated associations and co-operatives under the one piece of legislation or at least harmonisation of their governance requirements.

Regards,

Ken Crofts