



Professor Judith Dwyer
BA, MBA
Director of Research
Health Care Management
Level 2, Rm. 2.38
Health Sciences Building
GPO Box 2100
Adelaide SA 5001
Telephone +61 8 8201 7762
Judith.Dwyer@flinders.edu.au
Facsimile +61 8 8201 7766
www.flinders.edu.au

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

18th January, 2012

Dear Madam/Sir

Submission in response to the *Review of not-for-profit governance arrangements: Consultation Paper December 2011*

This is an individual submission, not representing any entity that may be regulated by the ACNC. However, the views expressed are based on extensive experience in the governance of not-for-profit bodies, both as a 'responsible individual' and as an academic. The body of this submission is structured using the numbered questions in the consultation paper.

My understanding of the proposals for governance regulation is based on the draft Bill to establish the Commission, the consultation paper itself, and the final report of the Scoping Study for a National Not-for-profit Regulator. I understand that the role of the Commission will be to register existing corporate entities (so that they can continue to enjoy tax and other benefits as charities and NFPs) and related functions; but that registration will not replace incorporation under a range of existing law. Commonwealth/national agencies that regulate incorporated bodies, including ASIC and potentially including ORIC, will cease to regulate governance and related aspects of corporate accountability, through a mechanism described as 'switching off' the application of such regulatory provisions to organisations that are registered with ACNC. State/territory regulators (principally under Associations Incorporations Acts) will continue to exercise regulatory roles and powers unless and until the jurisdiction reaches agreement with the Commonwealth to change that situation.

General comments

The government's initiative to modernise arrangements for the NFP sector, to support the good standing of the sector, and to attempt to reduce the accountability and regulatory burden, is welcome.

The fundamental challenge in designing a regulatory regime (for most sectors) is to design one that works effectively and reasonably efficiently for the vast majority of organizations and responsible individuals who seek diligently to comply with all applicable regulation; and at the same time provides the basis for sanctioning behavior that serves purposes other than the mission of the organization or contravenes law or does not meet community and professional or service

standards and duties of care. I suggest that the three most important criteria for assessing the goodness of regulation are the questions:

1. Is it workable for the overwhelming majority who are compliant?
2. Does it provide clear signals and boundaries to guide good practice and sanction bad?
3. Can compliance be adequately monitored and breaches investigated and sanctioned?

My comments below are based on these criteria. In practice, good governance is achieved by those who participate. Regulators cannot govern by remote control. Rather, they are faced with the difficult task of balancing competing imperatives. They must meet their obligations to 'build the floor' on which citizens can engage with NFPs and be confident of probity and effectiveness; while also 'getting out of the way' so that those who take the day-to-day responsibility can get on with it, and be unambiguously certain that the real responsibility is theirs, not the regulators'.

As always, our federal system entails complications. In general, the governance principles, and any other regulatory provisions, should be framed at the highest level of generality that is consistent with meaningfulness. This is not only because they must be applicable to organisations as various as the Catholic Church and the Oodlawirra Netball Association; but also because many NFP organisations will be subject to the governance requirements of other bodies, as well as to a broad range of other laws and regulations that impinge on governance. The potential for overlap and inconsistency will be considerable.

There is also the certainty that over time, the principles themselves will become outdated, and will then be the cause of other problems. To the greatest extent possible, things that should be reasonably easy to change should be kept out of the legislated principles.

Responses to consultation questions (numbered as in the paper)

1. The legislation should not attempt to specify who must be considered and to whom duty is owed by responsible individuals. Those matters are covered in constitutions and articles, as well as in the specific legislation under which NFP's are incorporated. It would be enough to require that the question of purpose, stakeholder interests and duties be addressed in articles. In any case, as the paper points out, the focus may not be persons.
3. The duties should be expressed generally, in terms like stewardship, fiduciary duty, compliance.
4. Standards of care should similarly be defined in general terms, as specific measures will be found in other legislation, in regulations, in community and professional standards, in codes of practice, in accounting standards, Australian Standards generally etc.
5. It is important that responsible individuals, and governing bodies as a whole, possess the relevant skills and experience. It is desirable for NFPs to specify the skills they require of board members in their articles or governance policies, and a provision for this should be included in guidelines/standards of good practice. However, it is not feasible to prescribe particular qualifications even for tiers of NFPs. Further, doing so may conflict with values and priorities strongly related to the mission of NFPs. For example, a body providing support to homeless people may include individuals lacking formal qualifications among their governing body membership.
7. Standardising duties across the NFP sector is not feasible. But again, guidelines and templates or model rules should include suggested wording for statements of duties.
9. Organisations that interact with or provide care to vulnerable people, particularly including children, should be required to meet higher standards of transparency and compliance, but the

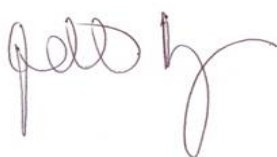
precise nature of these standards is a matter for bodies with the relevant expertise, and regulation of many aspects is a state/territory matter.

11. ACNC disclosure requirements should be tiered and related directly to the governance principles.
12. Remuneration of responsible individuals should be disclosed at the corporate not individual level (ie by publication of bands of remuneration and the number of individuals in each band).
13. Section 126 of the consultation paper outlines a suggested sample policy, and I assume that this is what is referred to as 'criteria' in Q13. The sample policy is clumsily written (eg use of the word 'wife' rather than 'spouse' or the more generic 'partner' or 'family member' in the second dot point). Dot point 4 unintentionally reduces the duty to avoid conflict of interest (by suggesting that personal interests 'not be allowed to take precedence' over the interests of the organization, as opposed to the requirement that the responsible person avoid participation in matters where there is a potential conflict of interest). Dot point 5 is ambiguous about who makes decisions once a conflict has been declared – 'responsible individuals' should be deleted and 'the governing body' inserted in its place. This section needs work.
14. Conflict of interest provisions require interpretation in codes of practice in all kinds of settings. This includes, but is not limited to, organisations that serve small communities or family groups. It would be helpful for guidelines to address this matter, and there are many examples of good practice available.
15. It is correct to seek to define conflict of interest as applying to matters broader than financial interest. [Perhaps the concept of 'conflict of duty' is a relevant one in the NFP world]. However, the Corporations Act provides a good starting point.
16. No additional risk management arrangements should be required. It is the risk profile that determines the risk management, not the source of funds.
17. Broad requirements for probity and prudent management of assets are appropriate. Particular mandated measures are not. Last year's mandated measures are next year's inadequate practice.
18. Mandating minimum insurance requirements may distort the market. However, guidance on this matter would be powerful (ie it would be difficult to defend levels lower than those specified in guidance, as updated from time to time).
19. NFPs should provide adequate indemnity to the responsible individuals who serve them. A small personal contribution may be necessary for legal reasons. Again, this should be the subject of guidelines rather than mandated.
20. Specific internal review procedures should not be mandated, but rather the subject of guidelines. External review (ie audit in the context) should apply as suggested in the Bill.
21. Core minimum governing rules requirements should be commensurate with those that apply under corporations law and/or associations incorporations acts.
23. Breaches of rules should be subject to proportionate action by the ACNC.
24. In wind-up of organisations, the governing rules regarding mission and purpose should constitute the essential guidance to administrators regarding disposition of assets and business. It is not clear what the role of the ACNC would be subsequent to deregistration.
25. Model rules are usually very helpful and tend to reduce the costs of incorporation.

29. The situation of churches is relevant to this question. Transparency and accountability seem to be particularly challenging for some churches, and while their purely spiritual functions may be seen to require exemption from the regulation that applies to other organisations, their charitable activities should not be included in any such exemption.
30. The uncertainty regarding state/territory arrangements is problematic; and there will be increased compliance requirements for at least some time. Red tape can be seen as the result of regulators seeking to control too tightly from the centre. The antidote is to keep the principles at the highest feasible level of generality; to provide comprehensive, consistent and up-to-date guidelines and model rules; and to ensure that the regulator has the capacity to assist struggling organizations and sanction those which contravene the principles. The use of 'cost of regulation' analysis (which essentially seeks to answer the question 'is the certain cost incurred by most organisations in completing each compliance task justified by both the size and cost of the problem of non-compliance and the effectiveness of the measure in preventing or uncovering noncompliance) may be useful.
32. I am not an Indigenous person, but have experience in working with Indigenous health organisations on governance matters. I would suggest that it is largely not helpful to the Aboriginal health sector to have special provisions. The normal requirements apply, and need to be interpreted appropriately, as in all areas of the sector. This is not a comment on the question of a continuing role for ORIC.
33. The requirement that government contracts cease to specify governance requirements is particularly welcome. The paper raises the situation of unincorporated NFP groups, but I think there is not a question about this issue. I suggest that the ACNC a) does not seek to regulate these legally non-existent entities; and b) publishes a fact sheet or other guidance that informs those who participate in the activities of unincorporated groups about the risks they take in doing so. Finally, it is critical that the ACNC is sufficiently resourced to monitor compliance, support organizations getting into difficulty and identify and investigate breaches.

I hope that these comments are useful.

Yours sincerely



Judith Dwyer,
Professor of Health Care Management, Flinders Medical School