



National Disability Services

NDS Submission

Review of Not-for-profit Governance Arrangements



National Disability Services

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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 around 700 non-government 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.

NDS welcomes the opportunity to comment on the review of not-for-profit governance arrangements but is disappointed at the brevity and timing of the consultation period during December-January.

The disability services system is facing the prospect of major reform which will have far-reaching implications for disability service providers. The proposed National Disability Insurance Scheme (NDIS) and the National Disability Strategy are very promising developments and full of opportunities; but like all reform of this magnitude they also present challenges and risks.

As governments increase their reliance on the non-government sector to deliver services, accountability pressure will also increase. The challenge over coming years is to ensure the accountability of non-government organisations for the expenditure of public funds while minimising red tape and maximising their flexibility to respond to the individual needs and aspirations of service users.

Good governance, operating within the context of a clear, unambiguous regulatory framework, will assist the not-for-profit disability sector with the considerable challenges it faces ahead.

General points

- NDS supports the vision that there will be high-level principles-based mandatory requirements for registered entities, as well as good practice guidance. A principles-based approach (as compared to a prescriptive approach) allows for continuous development in a dynamic sector.
- NDS supports the intent of the governance review to centralise and simplify the existing arrangements in order to reduce red tape and minimise compliance burdens for the sector. NDS members operate under a range of governance arrangements across a wide range of activities, which include providing employment services for people with disability in industries as diverse as packaging, recycling and forestry, as well as more typical care and support services. Across all models of governance and incorporation, NDS members report duplicative, burdensome and unclear governance requirements that are imposed and apply in many forms across the Commonwealth and the states and territories. One of the key messages arising from the Productivity Commissions report 'Contribution of the Not for Profit Sector' was to remove unnecessary burdens and costs faced by the not-for-profit (NFP) sector and to improve accountability.
- NDS supports the principle that governance requirements should be proportional to risk. NDS membership, like any other human services industry association represents a diverse set of organisations. A third of NDS members nationally have an annual turnover of under \$900,000. Governance rules should take into account the size of the entity, the risks it presents by virtue of its activities, and turnover as well as the level of government support a NFP

receives. A tiered approach enables a distinction between charitable and non-charitable NFP entities which reflects the higher level of public interest in the former.

- Consistent with the National Roundtable's response to the *Final Report on the Scoping Study for a National Not-for-Profit Regulator*¹, NDS is supportive of recommendations emerging from that work to strengthen the governance of the NFP sector. Perceptions of inconsistent governance standards exacerbate difficulties NDS members face in recruiting voluntary board members. The relative lack of governance education that most NFPs can afford their Directors is implicated here. NDS supports clearly articulated standards of governance, where this is underpinned by concerted efforts by government to resource the sector to develop good governance as a means to enhance sector accountability, probity and performance.
- NDS notes and supports that there is commitment for the ACNC to have a substantial educative role. This would assist NFPs to achieve best practice governance outcomes by producing practical guidance material.²
- NDS considers that most entities in the not-for-profit disability sector have effective and thorough governance arrangements in place. However, there have been notable if rare exceptions where poor governance has resulted in the failure of organisations and a risk to the reputation of the sector.
- NDS has also been very active in supporting its members through the design and delivery of governance education and in developing an evidence base which profiles the needs and preferences of the sector. This NDS experience informs this submission and is highlighted in the following section.

Governance in the NFP disability Sector – recent NDS work

The discussion paper implies that the NFP sector has been largely by-passed in the trend towards heightened levels of interest in governance and accountability in the commercial and government sectors. This is not entirely true in relation to the disability sector. NDS has continued to experience demand for high quality advice and support on governance matters and has responded to this in several ways:

- **Developing the evidence base.** NDS's experience suggests that it is vital to know the existing perceptions and learning preferences of voluntary Directors before designing any effective adult learning programs in governance. The Good Governance Program, an initiative of NSW Ageing Disability and Home Care (ADHC), is an example. This has been developed and implemented by National Disability Services NSW (NDS) with the assistance of a Steering

¹ National Roundtable of Non-profit Organisations submission in response to *the Scoping Study for a National Not-for-Profit Regulator, March 2011*

² Review of not-for-profit governance arrangements, Consultation Paper, December, 2011, p3

Group of other peak representatives and ADHC. The design of the Good Governance Program was informed by a research project conducted in early 2009. The Program was then implemented over the following two years, with an evaluation and repeat of the baseline survey in 2011. NSW disability services represent about one third of all providers nationally.

- **Sector-specific learning and development programs aimed at voluntary board members.** These have included resources and adult learning programs that are specific to the needs and preferences revealed in foundation research to establish the evidence base, as mentioned above. NDS would highlight the value of creating the opportunity for voluntary directors from any sector to discuss the challenges and the application of good governance within the operating context of their own sector. Two recent examples where NDS has produced resources that blend generic good governance material with sector-specific context include the FaHCSIA *Governance Essentials for Voluntary Board Members (2010)* for disability employment services, and the *Essentials of Good Governance, A guide for organisations funded by the Department of Aging, Disability and Homecare in NSW (2009)*.

Specific Consultation Questions

Note

The consultation paper refers to ‘responsible individuals’. The definition of a ‘responsible individual’³ is confusing and fails to give clarity to which ‘officers’ it applies. This arises from the inclusion of ‘officer’ in the statement “an individual who is a director or officer of the registered entity”.

NDS responses focus principally on the role of board members.

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?**

Yes, it is vitally important that internal and external stakeholders (especially regulatory agencies) are clear about the lines of accountability between voluntary Directors and the “owners” (members) of the entity, in contrast to other key stakeholders whose views it is reasonable and appropriate to seek in setting the strategic direction of an entity but to whom responsible individuals do not necessarily owe a duty - that is, a duty to act in the best interest of the objects, taking into account the primary stakeholders of the organisation. Not all NFPs have members, and so the legislative requirement should be for the entity, in its governing rules, to identify its primary stakeholders. This should be supplemented by guidance to assist the responsible individuals to identify the full range of stakeholders in the entity and delineate their duty of care as noted above.

³ ACNC Exposure Draft.

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?

Responsible individuals should primarily consider the mission, vision and values as outlined in the entity's constitution or governing document as the basis for all decision-making and exercise of their fiduciary duties. Most entities have multiple stakeholders, but a responsible person's primary obligation is to exercise their fiduciary duties in accordance with the stated aims and objectives of the entity and the primary stakeholders identified there. Given the diversity of the sector, guidance should be provided to responsible individuals considering such factors as:

- Structure, size and purpose
- Sources of funding (public, private and philanthropic)

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

Subject to the lack of clarity about the definition of 'responsible individuals', NDS is generally of the view that governance principles should be consistent across sectors. Consequently, it is important that new governance regulations for the NFP sector align with those that already apply under the Corporations Act, e.g. for public companies limited by guarantee. NDS believes that those set out in the consultation document at paragraph 91 are sound:

- a duty of care and diligence;
- a duty to act in good faith in the best interests of the entity;
- a duty not to misuse their position;
- a duty not to misuse information; and
- a duty to disclose material personal interests.

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 minimum standards of care required of the Corporations Act (i.e. a "reasonable person"), with no distinction between individuals on the basis of payment and/or qualification, should guide developments, supported by common law in this area.

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)?

No, the introduction of minimum qualifications for voluntary Directors would severely hamper the ability of not-for-profit community service organisations to recruit and retain sufficient Board level talent. It would also introduce a requirement that does not currently apply to for-profit companies, and so, in the context of competitive neutrality, should not pass any comparative regulatory impact assessment.

There is a lack of research on the profile of not-for-profit boards, and the degree of professionalization that may have occurred over recent years. However there is some evidence to suggest that entities are seeking to 'professionalise' their boards. NDS's own research⁴ is revealing:

'When asked whether any Board members belonged to professional associations related to governance, 45% of organisations reported that they did, with 50% of organisations having accountants, 25% having members of the Australian Institute of Company Directors and 20% having lawyers as Board members. About one-third of organisations reported some other professional membership, including membership of National Disability Services, Australian Psychologists Association and other social welfare related professions'⁵.

NDS, working in partnership with the Australian Institute of Company Directors (AICD), has recently (2011) offered a disability sector tailored version of the AICD *Foundations of Directors* course, funded by the NSW Government. The offer elicited overwhelming demand and the 200 places available were oversubscribed by over 100%. That there is enormous interest in personal and professional development opportunities in this area is clear, but NDS remains of the view that this should not add weight to arguments for setting a qualification threshold for responsible individuals. This would be counterproductive to the board renewal / succession agenda so crucial to an effective progress.

Instead, NDS proposes that the ACNC set clear principles and work with relevant industry associations to raise standards of governance and encourage funders / regulators (eg the National Disability Insurance Agency, should it be established) to consider governance development as a core cost of risk management and reform.

The best governance requires informed decision-making that takes account of different expertise and perspectives on an issue. Having a board containing qualified professionals does not ensure high-quality consumer outcomes from organisations providing community services. NDS members would argue that the contributions of a parent carer or service recipient are as valuable as a qualified professional. This is particularly relevant in the disability sector where many organisations, founded and grounded in community advocacy, consider it important for service recipients to have a voice at the Board level. This is consistent with the principles of social inclusion and participation that underpin current government policy settings (e.g. National Disability Strategy). The introduction of a qualification threshold could prohibit the valuable perspectives of many people with disability from being heard. In effect, they would be 'shut out' of governance roles.

What is more important is that a board has access to the specialist subject matter expertise it requires to meet the obligations required by funding bodies, that it is properly resourced to access that expertise and knows where and how to source it.

⁴ See for example research funded by the NSW government as part of establishing the NSW Good Governance program, a survey of ADHC funded organisations undertaken by Bradfield Nyland Group and NDS, 2009.

⁵ NSW Good Governance Program Evaluation, NDS, 2011

There is scope to promote qualifications for key roles on boards as best practice, particularly for audit and risk functions of larger entities, but NDS would want to consult more specifically with its members about this issue before forming a view about the appropriate thresholds.

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

Boards may have specific positions that carry additional particular responsibilities such as chair, treasurer or company secretary, and these should be defined in the governing rules of the entity; but NDS holds the view that minimum standards should apply to all responsible individuals associated with a registered entity.

Inappropriate individuals should be prohibited from becoming 'responsible individuals' for NFP entities in the same way as described under the Corporations Act, at para 99 of the consultation paper.

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

Not if a principle-based approach, supported by common law development, is adopted as the basis for the regulatory approach.

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?

No. The combination of the proposed principle-based (tiered) approach combined with the reasonable person test should be sufficient.

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 reflect those currently contained in the Corporations Act, which has a solid and evolving basis in common law. The core duties, however, should reflect the unique nature and purpose of the NFP sector and its role and contribution to delivering a social result or impact.

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

The ACNC should develop and / or provide a range of resources (e.g. sample corporate governance policies) and templates based on the common principles and tailored to different tiers of entities. Every entity should report at a minimum:

- An annual statement of compliance with their own corporate governance policy, based on the ACNC standard, and;
- Abridged financials in accordance with the relevant accounting standards e.g. (Australian Accounting Standards Board)

For larger organisations public availability of this content should be mandatory (e.g. as required by the ASX, and all entities should be encouraged to provide public access to them.

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

The level of public interest and investment in the sector justifies an appropriate transparency around remuneration and / or other benefits provided to Board; however, noting the lack of clarity around the definition of responsible individuals above, the disclosure of the remuneration of executives should remain a matter for individual entities.

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

The criteria suggested at para 126 of the consultation document are appropriate.

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 comment.

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'?

“Material personal interest” is a good basis for stipulating the types of conflict of interest that responsible individuals in NFP entities should disclose, in addition to the criteria suggested at para 126 of the consultation . NDS notes that the term itself “material interest” is not defined under the Corporations Act. As a point of difference with the for-profit sector, the application of “material personal interest” and the suggested criteria for the NFP sector should strongly encourage the importance of full disclosure in order to avoid reputational risk to the entity and the wider NFP sector.

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

NDS does not support the codification of particular risk management requirements for NFP entities. Instead the ACNC should develop and / or promote a range of advisory resources tailored to each tier of entities. One example that NDS has been involved with is the NSW Good Governance manual for organisations funded by the Department of Ageing, Disability, and Home care ('It's Your Business'), which contains a chapter on risk management, including tools and templates to monitor and manage operational and strategic risk. NDS has also recently developed resources on Fraud and Corruption and engaged subject matter experts to deliver workshops to present generic tools (based on best practice and standards) that entities can tailor to their unique circumstances. NDS has found the sector highly receptive to this approach.

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

Having an investment strategy should be recommended for entities (with guidance material tailored to the diverse circumstances and capacities of organisations), but not mandated.

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

NDS would argue that any 'reasonable person' or 'responsible individual' applying duty of care, where the entity is providing essential services to often marginalised and vulnerable client groups, would consider it reasonable to have insurance coverage. Whilst the cost of insurances for NFPs can be high (and rising), the cost of a single insurance claim against an entity can be devastating.

Minimum insurance requirements should only be mandated where the costs of meeting this obligation meet a cost / benefit test and are clearly, and transparently, factored into an efficient price (and reasonable overhead) for services.

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

There is a strong case that responsible individuals should have indemnity insurance. However, this issue remains largely a personal consideration for those who opt to be 'responsible individuals'. Within the context of the disability sector, many organisations, though recognising the need for indemnity insurance, are not funded sufficiently to meet this obligation. Consequently, whether the requirement should become mandatory depends on whether NFP entities' funding reflects the true costs of service delivery and reasonable overheads. Enabling (i.e. funding) entities to offer to cover the cost of personal indemnity insurance would help remove an often-cited barrier to the attraction, recruitment and retention of Board members.

20. What internal review procedures should be mandated?

Internal review processes should not be mandated. There is however an opportunity to promote good practice in internal review processes, including preventing fraud and corruption, and in aligning internal review processes to external review and auditing requirements in cost-effective ways. There is scope to reduce tape and the cost of compliance for NFPs in rationalising states' and territories' external and auditing reporting requirements across all forms of incorporation.

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

Given the diversity of forms of governing rules (i.e. constitution, association rules, cooperative rules, memorandum and articles of association, or a trust deed) there is limited scope to mandate core minimum requirements, but governing rules should at least cover:

- the objectives of the entity, its purpose, and the process for moderating and / or changing these, and for winding up the entity (including distribution of surplus assets);
- the rules for the appointment and removal of responsible individuals, together with their responsibilities and powers;
- the rules for appointing members or other 'owners' of the entity, and how these members can congregate or act collectively to hold the responsible individuals to account for their fiduciary duty of care;

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, the ACNC should have a role to mandate model, replaceable and mandatory rules, as long as it takes a tiered approach based on the nature and size of the entity (reflecting the diversity of the sector) whilst setting clear, unambiguous and transparent governance requirements.

23. Who should be able to enforce the rules?

The members, trustees, or other "owners" who appoint the responsible individuals of the entity.

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

In the event of a dispute amongst the members, trustees and / or responsible individuals of that entity, the ACNC may have a mediation / arbitration role in accordance with that entity's dispute resolution policies and procedures. Similarly, in

the event of a complaint by a non-member / trustee, the ACNC should have a role in the investigation of the entity.

The ACNC role should be to facilitate the work of the sector rather than have an undue focus on regulation and control.

25. Should model rules be used?

Yes, model rules are useful if they provide for each tier of NFP as proposed by the Productivity Commission report on the NFP sector.

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

An entity's relationship with its members should be defined by mandatory governance rules that cover and enable the rights of members to:

- influence the appointment, removal of responsible individuals
- have access to financial information pertaining to the operation of the entity
- request special and / or annual general meetings pertaining to any aspect of the entity's operations

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

No comment

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

Yes, compulsory meeting requirements should require at least an annual general meeting and records of all meetings of responsible individuals for all NFP entities.

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

NDS members that operate services with an annual turnover less than \$5m, and those in rural, and remote areas, typically report more problems attracting and retaining 'responsible individuals', and in resourcing an ongoing program of governance development.

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?

During a transition period, as the new regulations take effect, entities should become exempt from governance requirements of other jurisdictions.

NDS is keen to work with the ACNC to develop a regulatory impact assessment of in relation to the NFP disability sector and, in particular, to identify a cohort of organisations of varying size, geographical location and current constitutional arrangements to test the new regulations, so that the ACNC, and the sector, can have the confidence that any developments in this area are an improvement.

The application of IT to mandatory reporting requirements (e.g. portal) together with the provision of easy-to-use resources, including templates, is likely to contribute to a reduction in red tape.

NDS is also interested to explore the merits of shared back-office arrangements for small not-for-profit disability organisations.

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

Refer to NDS's submission on the Exposure Draft Bill to establish the ACNC.

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?

Governance development is most effective when it is undertaken with full knowledge of the specific policy environment and pressures on different parts of the NFP sector. NDS recommends that relevant NFP peak bodies be funded to undertake the educative tasks associated with implementing new governance arrangements for the segment of the not-for-profit sector which they represent.



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