

24 January 2012



Mr Chris Leggett
Philanthropy & Exemptions Unit
Personal and Retirement & Income Division
The Treasury
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PARKES ACT 2600

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Dear Mr Leggett

Review of Not-for-profit governance arrangements

The National Heart Foundation of Australia (Heart Foundation) welcomes the opportunity to comment on the Australian Government's review of governance arrangements for the not-for-profit sector. In particular, the Heart Foundation would like to provide comment on specific areas of the proposed high-level principles that will form the framework to be implemented by the new Charities and Not-for-profit Commission. The Heart Foundation is pleased to have the opportunity to make a brief submission.

The National Heart Foundation of Australia is a charity dedicated to reducing death and suffering from the leading killer of Australians, cardiovascular disease (CVD).¹

Not-for profit (NFP) organisations provide resources and assistance to the community in general and especially those who are vulnerable and marginalised, who live in rural and remote areas and Aboriginal and Torres Strait Islander peoples especially when there are not adequate government services. Because of this, and the focus of the Heart Foundation's activities, the Heart Foundation provides information and services for the benefit of disadvantaged sections of the Australian community. These activities are heavily relied upon and the information distributed free of charge to the community is aimed at saving lives and reducing disability from CVD. Overall, this helps to reduce the reliance on government provided services and helps to reduce the burden on the healthcare system.

As a NFP charity, the Heart Foundation supports the Government's proposed reforms of the sector and simplification of the current governance arrangements.

From the outset, the Heart Foundation does not see any problem with the current requirements under the Corporations Act and the relevant state and territory legislation that regulates the incorporation of an Association and would welcome the requirements from both to be rolled into the new arrangements. However, where new compliance arrangements are required new costs may be incurred to meet the new framework. As a NFP, we would like to see that there is minimal cost to the charities as the majority of funding comes from the community to carry out the mission of the organisation, not to spend more on administrative costs.

At the same time, the Heart Foundation recognises that the current governance arrangements are duplicated across jurisdictions, with complicated administrative

¹ Australian Institute of Health and Welfare, *Cardiovascular Disease Australian Facts 2011*, 2011

requirements for NFPs and a lack of transparency. NFPs currently have to work in a complex legislative environment governed by 15 federal Acts and 162 state and territory Acts spanning across 19 federal, state and territory departments including the Australian Tax Office, Australian Securities and Investments Commission, Office of the Registrar of Indigenous Corporations and state Attorneys-General.²

As a federated charity, the Heart Foundation has eight state and territory divisions, and a national body with a binding Memorandum of Understanding that provides a framework for operations. The complexity of the legislative environment is a huge burden on these organisational arrangements with various structures and reporting requirements across the states, territories and nationally.

The Heart Foundation is a public company limited by guarantee as are five of the Divisions (Queensland, New South Wales, Victoria, Tasmania, Australian Capital Territory). The other three Divisions (South Australia, Western Australia, Northern Territory) are incorporated associations. The Heart Foundation, and each State and Territory Division, has been separately endorsed by the Australian Taxation Office as an income tax exempt charity (Item 1.1 – charitable institution, subdivision 50-5 of the Income Tax Assessment Act 1997), and as a deductible gift recipient (Item 4.1.1 – public benevolent institution, subdivision 30-B of the Income Tax Assessment Act 1997).

The Heart Foundation has established a corporate governance statement to help guide the organisation towards best practice in governance. The principles and policies are regularly reviewed and are implemented through a variety of means including bi-monthly reviews of financial statements. A copy of the Heart Foundation's current corporate governance statement is attached for information (*attachment one*).

Forming part of the statement, various frameworks have been developed for the organisation. These frameworks include a corporate governance framework on standards, ethics and code of conduct for all staff, directors, committee members, honoraries and management. An additional framework on comprehensive risk management with internal guidelines, policies and procedures as well as commercial relations guidelines, privacy policy and an investment policy are also in place.

As a NFP, the Heart Foundation ensures that these internal policies underpin the values and operations of the organisation allowing delivery of transparent and reliable services and information to all Australians and funding bodies. However, to ensure that this continues, the Heart Foundation supports high-level principle-based governance arrangements at a government level and from one central regulating point.

Streamlining governance arrangements for charities will not only simplify the administrative process, but should also increase public confidence in the integrity and transparency of charities in Australia.

The Heart Foundation supports the government's review of governance arrangements, especially as it aims to simplify and centralise existing arrangements to help reduce red tape and the compliance burdens. This is an important government objective that should be very clearly set out, with appropriate goals, targets and evaluation adopted to ensure that the government's commitment to the NFP sector, and through it to the broader community, is met in full.

While the Heart Foundation supports the establishment of governance principles that will provide flexibility for the sector, we would like to see that these principles are entrenched in

² National Roundtable of Nonprofit Organisations, 2011

legislation with a public commitment by the government to the sector to uphold the new standards and arrangements. This will provide confidence for the sector into the future.

Although further discussion papers are expected on aspects of the NFP reform process, including fundraising regulation and companies limited by guarantee, the Heart Foundation seeks assurances that there will be a smooth and phased transition to allow simple and cost-free transition to the new administrative arrangements. There should also be a process put in place to ensure any unexpected difficulties and unintended consequences are dealt with efficiently and effectively by government working closely in collaboration with affected NFPs.

Consideration should also be given to an appeals mechanism to help any NFP that believes it has been disadvantaged or its operations put at risk through the implementation of the new arrangements.

To address these suggestions and as part of the consultation process to review the governance arrangements for the NFP sector, the Heart Foundation wishes to highlight some specific issues addressing selected governance principles set out in point 83 of the consultation paper.

1. Internal and external reviews and auditing requirements (addressing 83.3.1) Heart Foundation proposed principle: Size categories

The *Final Report of the Scoping Study for a national Not-for-profit Regulator* discussed that the governance rules 'should take into account the size of entity, the risks it presents by virtue of its activities, and turnover as well as the level of government support a NFP receives'.³

The Heart Foundation agrees that annual account reviews, by a registered auditor, will ensure public confidence in the sector and will help ensure organisations meet their missions.

The Heart Foundation calls for a simple system that categorises NFPs according to size. This should be broader in scope than the system employed under the Corporations Act.

Currently, a company limited by guarantee with an annual revenue less than \$250,000 is considered 'small', a company limited by guarantee with annual revenue between \$250,000 and \$1 million is 'medium' and a 'large' company is over \$1 million.⁴

Given the very large number of NFPs and great diversity of the organisations themselves, consideration should be given to having two additional categories – 'very large' being over \$100 million and 'very small' being below \$50,000 – and scaling down the obligations accordingly and all indexed annually.

The Heart Foundation strongly endorses the need for transparency. However, we are keen that the broader community, in seeking assurances that NFPs are performing effectively and efficiency, can compare 'apples with apples'.

The ability to determine a 'league table' from information made public by the Commission or other government agencies may be an unintended consequence of the reform process. While the Heart Foundation is not opposed to 'league tables' per se, the government should ensure that there is some way of grouping NFPs that work in similar environments and face, for example, similar fund-raising and operational challenges. There should also be an

³ The Treasury, *Final Report of the Scoping Study for a national Not-for-profit Regulator*, April 2011

⁴ Australian Securities & Investments Commission

opportunity for organisations to make commentary around figures: for example investment for growth – or investment with a return expected over more than one financial year. This would help mitigate the damage that may be done when unfair comparisons are made between organisations operating in very different environments and circumstances.

In considering international organisations, the New Zealand Charities Commission requires NFPs to file an annual return which the public can access on the Commission's website.⁵

Additionally, NFPs also lodge their own financial statements in any format (subject to what is required in these statements) with the Commission. However, depending on what information has been disclosed in the charity's financial statements, it may be possible to establish costs such as fundraising and draw up league tables.

The England and Wales system requires an annual return to be submitted to the Charity Commission, which then provides a public register list on their website. The list displays the totals for incomes, spending, own-use assets and investment assets. The totals shown for each item are calculated from a combination of information submitted in annual returns and representative sampling and are updated every three months.⁶ Individual charities can be searched and entire financials from the annual return can be viewed.

The Heart Foundation would welcome a system that requires an annual report and a financial statement in any format (subject to what is required in these statements) as per the New Zealand System. However the reporting requirements should vary depending on the size of the organisation, similar activities such as fund-raising and operational challenges.

2. Coverage of the minimum requirements of governing rules (addressing 83.4)

Heart Foundation proposed principle: One single national reporting requirement

The Heart Foundation strongly supports the development of one single national reporting requirement for the NFP sector.

Currently the Heart Foundation is required to comply with the Corporations Act and lodge annual consolidated Financial Statements to the Australian Securities and Investment Commission (ASIC) and these are required to be prepared within accordance with Australian Accounting Standards. In addition, NFPs are required to report to ASIC changes in national directors (names and personal details) and to review this information each August and return a report. Failure to meet these requirements results in fines which can escalate quickly. In addition, the Heart Foundation provides monthly BAS and Group Tax Reports and an annual Imputation Credits Report to the ATO.

Fundraising activities are regulated in each State and Territory which have differing reporting requirements; as a national organisation the Heart Foundation complies with the requirements of the States and Territories in regard to its fundraising activities. Harmonisation and/or rationalisation of fundraising and associated legislation would provide efficiencies to national charities such as the Heart Foundation.

In Canada, the Charities Directorate requires that registered charities must file an annual information return, which includes financial statements together with details of all directors/trustees. However, registration as a charity for tax exempt status can be revoked if the information return is not filed within six months of the end of a charity's financial year.⁷

⁵ Charity Commission – New Zealand, <http://www.charities.govt.nz/>, accessed 13 January 2012

⁶ Charity Commission – England and Wales, <http://www.charity-commission.gov.uk/index.aspx>, accessed 13 January 2012

⁷ Canada Revenue Agency, Charities Directorate, <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtnng/rtrn/cnsqncs-eng.html>, accessed 17 January 2012

The Heart Foundation supports this requirement as the Corporations Act requires reports within four months, therefore revoking charity status after six months would be appropriate. This will help to ensure confidence in the sector by donor's and funding bodies.

The Heart Foundation suggests that all reporting requirements for NFPs are managed through one central point, the ACNC and that state and territory legislation is also streamlined with the national requirements.

In addition for federated organisations such as the Heart Foundation, we would like to see the legislation require amalgamated returns instead of potentially nine annual returns to ACNC from each of the state and territory offices of the organisation.

3. Disclosure requirements and managing conflicts of interest and risk management procedures (addressing 83.2 and 83.3)

The Heart Foundation agrees appropriate consideration should be given to disclosure requirements, management of conflict and risk management guidelines in the new arrangements.

Currently, under federal, state and territory laws NFPs are required to disclose operational information such as annual reports, fundraising income and expenditure and remuneration of responsible individuals. Additionally, there is a need for NFPs to ensure conflicts of interest are managed and risk management procedures are in place which includes external reviews and audits.

The Heart Foundation complies with these requirements through its own corporate governance arrangements (attachment one). We support the requirement for all NFPs to have their governance arrangements, but that organisations have the flexibility to apply their own model. However, all organisational arrangements should adhere to the high-level principles-based arrangements that will be the result of this consultation process.

As previously noted the Heart Foundation operates under an MOU between the various entities within the group. As a part of these arrangements surplus funds from the States and Territories are transferred back to the National company and managed under the investment policy as a means of prudent risk management for the group. We note the intent to provide visibility to the transfer of funds to other entities that may be offshore (section 120 of the consultation paper). If it is the offshore nature of transfers that are of concern to the commission then care should be taken in drafting to ensure there are not unintended consequences of any such legislation.

To elaborate on these points, the Heart Foundation would like to address selected questions from the consultation paper as we would like to see these given priority in the formulation of the new governance arrangements.

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

The NFP sector consists of an extremely diverse group of organisations undertaking a wide range of activities. The skills and experiences of responsible staff along with access to key resources will vary; however, the responsibility of key individuals should be clearly defined.

Given this diversity, there may be value in alignment of NFPs of certain size with the Corporations Act.

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?

Volunteers participate in the NFP sector at a variety of levels within the range of organisations they give their time to, these roles range from basic administrative roles through to volunteer Directors. Whilst it is critical that basic governance principles are applied to engender public confidence in the sector, the extent of such obligations need to be applied carefully so as not to damage the participation of volunteers in the sector. This may be particularly pertinent to the establishment of any civil penalties that may be enshrined in legislation and the impact this may have on volunteers who act in decision making roles such as volunteer Directors.

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

The integrity of the information provided is imperative for good governance. Reporting standards should be established to enable independent assessment of data.

Financial information in itself provides insight into the operations however qualitative commentary is required to explain the financial data.

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

Regardless of the source of funds each NFP should act honestly and responsibly. Controls and measures should be in place to protect funds and assets from fraud or misuse. A risk management framework should be in place at each NFP albeit the level of detail and complexity will vary for each organisation.

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

The investment strategy will vary between organisations depending on their strategic direction and the support investments play in achieving their goals. An investment policy and governance structure will help ensure prudent management of investments. The ACNC may wish to consider a threshold figure whereby such policies are required where funds under management exceed a certain value.

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

The constitution and by-laws, Board Charter, code of conduct and organisational policies will include the governing rules. Such content will include; the purpose of the organisation, corporate registration, details of the governing body, the office bearers and their responsibilities, auditor appointment, and so on.

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?

It is recommended that the ACNC issue best practice guidance rather than mandating requirements for governing rules.

Who should be able to enforce the rules?

If the governing rules are breached or changed then the organisations registration should be reviewed. This could potentially be a role of the ACNC.

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

The NFP sector is diverse in its activities, size of organisations, and corporate structures. Any publication of performance data should be based on clear definitions and presented with supplied commentary from the NFP.

Finally, the Heart Foundation would like to address points raised in the *Final Report on the Scoping Study for a National Not-for-Profit Regulator* (Final Report) which raised a number of points to be considered in the review of governance arrangements. These points provide good principles to help form the basis for new arrangements.

The Final Report suggested:

- **Organisational governance rules should be proportional to the size of entities, risk factors and receipt of public and government assistance**

The Heart Foundation agrees that organisational governance rules should be proportional to the size of entities, risk factors and receipt of public and governance assistance as stated in this response.

- **The regulation of service provision should remain with existing entities**

The Heart Foundation agrees that the regulation of service provision should remain with existing entities. Service quality is best assessed within a framework developed by experts within a specific discipline and would be too broad a task for a corporate regulator in the NFP sector.

- **Government contracts should no longer mandate organisational governance requirements for NFPs**

With the introduction of a NFP regulator overseeing governance arrangements it would appear unnecessary to repeatedly document governance structures in governance contracts.

- **Over the long term, the national regulator should be provided with powers regarding asset protection, the suspension and/or removal of responsible persons, registration and deregistration, the enforcement of governance rules, investigative processes, enforcement powers, including civil penalties and the imposition of fines, proportional compliance activities, and, dispute resolution processes**

If the role and function of the national regulator is inclusive of the tasks listed in this question then clarity is required as to the overriding regulation when there is conflict with rules administered by another regulator such as ASIC. As noted earlier in this response the introduction of civil penalties and fines should be done in a manner that does not have an adverse impact on the participation rate of volunteers in the sector.

In summary, the Heart Foundation supports high-level principle based mandatory governance requirements for the NFP sector. This will allow varying sized, operated and structured NFPs to operate specific to the organisation's needs but at the same time ensure good governance practices are met.

We wish you well with your deliberations and would be keen to assist with any inquiries you may have or provide further assistance during the consultations on the draft law before implementation.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Lyn Roberts', written in a cursive style.

Dr Lyn Roberts AM
Chief Executive Officer - National

Directors' Report (continued)

for the year ended 31 December 2010

Meetings of Board Committees

A summary of Board Committee meetings held and attended is set out below:

	National Executive Committee	Cardiovascular Health Advisory Committee	National Finance Advisory Committee	National Audit Governance and Ethics Committee	Food Information Program Oversight Committee
	#	#		#	#
A/Professor R M Allan		3/5			
Professor P E G Aylward		3/5			
Mr B J Carter	2/2				
Dr A E Carruthers				1/1	
Professor M M Daube	2/2			4/4	
Mr B J Davies OAM	1/2		7/7	4/4	
Ms H J Egan				4/4	4/5
Professor G L Jennings AM	-/2	4/5			
Dr J A Johns		4/5			
Dr P T Sexton	2/2	5/5		4/4	
Mr C B Taylor	2/2		5/7	2/4	

These committees have other honorary members who are not directors of the National Heart Foundation of Australia.

Corporate Governance Statement

The Foundation is a company limited by guarantee, incorporated under the Corporations Act 2001. Ultimate responsibility for the governance of the company rests with the Board of Directors. This corporate governance statement outlines how the Board meets that responsibility. The Board believes the principles of good corporate governance underpin the values and behaviour of the Foundation.

Role of the Board

The Board's primary role is to ensure that the activities of the Foundation are directed towards achieving its Mission to reduce suffering and death from heart, stroke and blood vessel disease in Australia. The Board must ensure that this mission is achieved in the most efficient and effective way. The Foundation operates as part of a co-operative federation with Divisions in each of the other States and Territories of Australia. Such operations are set out in a Memorandum of Understanding ("MOU") between those entities. In terms of the MOU, certain services ("shared services") are conducted by one Division on behalf of the remainder and the cost of carrying out such shared services is reimbursed by the other Divisions. In terms of the MOU, Divisions make grants to the National Heart Foundation of Australia to fund research and other health programs conducted on a National basis.

Oversight by the Board

The Board oversees and monitors the performance of management by:

- Meeting six times during the year
- Receiving detailed financial and other reports from management at those meetings
- Receiving additional information and input from management when necessary
- Assigning to the Cardiovascular Health Advisory Committee; the National Finance Advisory Committee; and the Audit, Governance and Ethics Committee responsibility to oversee particular aspects of the operations and administration of the Foundation

Each Board Committee operates under its own terms of reference approved by the Board.

Directors' Report (continued)

for the year ended 31 December 2010

Specific responsibilities of the Board

The Board fulfils its primary role by:

- Selecting, appointing, guiding and monitoring the performance of the Chief Executive Officer ("CEO")
- Formulating the strategic plan of the Foundation in conjunction with the CEO and management
- Approving operating and capital budgets formulated by the CEO and management
- Monitoring the progress of management in achieving the strategic plan
- Monitoring the adherence by management to operating and capital budgets
- Ensuring the integrity of internal control, risk management and management information systems
- Ensuring stakeholders receive regular reports, including financial reports
- Ensuring the independence of the Foundation from government, industry and other groups in determining health and other policies and recommendations
- Ensuring the Foundation complies with relevant legislation and regulations
- Acting as an advocate for the Foundation whenever and wherever necessary

These responsibilities are set out in a *Corporate Governance Framework*, including a *Board Charter*.

Responsibilities of management

The Board has formally delegated responsibility for the day-to-day operations and administration of the Foundation to the CEO and executive management.

Board members

All Board members are independent, non-executive directors and act in an honorary capacity. The Constitution of the Foundation specifies:

- The directors of the Company shall be the National President, the State Member Foundation Representatives, the Cardiac Society Representative and any additional directors appointed in accordance with the Constitution.
- Other than for the position of Secretary, no person who is an employee of the Company, a State Member Foundation, or a local branch of a State Member Foundation, is eligible for nomination or appointment as an office bearer or director.

The Constitution requires all additional directors to retire from office at each Annual General Meeting, but each is eligible for re-election. The maximum number of additional directors to be elected shall not exceed five. The Constitution also requires, at each Annual General Meeting, the election of the National President, the Deputy National President and the National Treasurer. The Cardiac Society of Australia and New Zealand Representative holds office as a director of the National Company until the person ceases to be a member of the Cardiac Society, or the Cardiac Society nominates another person.

Each State Member Foundation Representative is appointed by his or her State or Territory and holds office as a director of the National Company for the duration of their appointment by their Division. Usually, the appointee is the President of the Division.

The Board is the final authority on the operations of the Foundation and has complete responsibility for the control and overall management of the affairs, funds and property of the National Company. It oversees corporate strategy, policy and performance, thus helping protect the rights and interests of the Foundation, its employees, donors and stakeholders. The Board ensures it is well equipped with skills and expertise relevant to the Foundation's activities to make it a stable and effective governing body. The current Board's qualifications, skills, experience and responsibilities appear on pages 4-6.

Board members receive written advice of the terms and conditions of their appointment and complete a structured induction program when first appointed. Management presentations to the Board enable directors to maintain knowledge of the business and operations of the Foundation. A formalised *Board Performance Evaluation* process is undertaken.

Risk management

The Board oversees the establishment, implementation and regular review of the risk management system of the Foundation, which is designed to protect its reputation and manage those risks that might preclude it from achieving its mission. Management is responsible for establishing and implementing the risk management system which assesses, monitors and manages operational, financial reporting and compliance risks.

The financial statements of the Foundation are subject to independent, external audit. Guidelines for internal controls have been adopted and compliance is reviewed bi-annually by independent staff from another Division.

Ethical standards and code of conduct

Board members, all staff and volunteers are expected to comply with relevant laws and codes of conduct of relevant professional bodies, and to act with integrity, compassion, fairness and honesty at all times when dealing with colleagues and any stakeholders in the mission of the Foundation. Board members, all staff and volunteers are provided with a copy of the Foundation's Code of Conduct policy during their induction to the organisation.