



Response to Treasury Consultation Paper

Review of not-for-profit governance arrangements

About O Group

O Group is a not for profit community business partnership that brings together Business & Employment, NGT Tasmania, CHOOSE Employment, Findstaff.biz, Developing Potential Australia and Business Mentor Services Tasmania.

O Group, is a long-term provider of services within the Tasmanian labour market and has developed a strategic mandate, operational capability and resource capacity to work in collaboration with government, industry and other stakeholders to improve the availability and skills of the Tasmanian labour force.

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?*

Yes, but only insofar as prescribing the broad categories (or *types*) of stakeholders that responsible individuals must consider. Prescribing more exactly is unlikely to prove reasonable.

O group maintains that mandating the types of stakeholders that responsible individuals must consider helps to ensure that appropriate 'care and diligence' is taken toward the respective interests of parties impacted on by the organisation.

The legislation should, however, allow and encourage responsible individuals to show regard to those interests in a considered and coordinated way; reasonably weighted by the evaluated merit of the respective stakeholders' interests and the expected net impact of the organisation's actions on those interests, just as one would expect any 'reasonable person' acting in 'good faith' to do. Whilst goal congruence should be a desired outcome whenever possible and appropriate, it should not be used as a rationale for contrived utilitarianism.

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?*

From a pluralistic perspective, an organisation's powers, capabilities and influence do not evolve exclusively from its owners or its executive, but rather from a series of 'contracts' that it has

with various stakeholders. Precisely who those stakeholders are will vary from organisation to organisation depending on the organisation's history, purpose and activities.

Because of the relative importance of a NFP's 'social contract', its list of stakeholders is likely to be broader than that of a profit-driven entity. The type of stakeholders that O group believes a responsible individual in an NFP must consider includes:

- i. Financiers (e.g., donors, philanthropists, governments, customers etc.)
- ii. Beneficiaries (incl., in some circumstances, their supporters)
- iii. Staff and volunteers
- iv. Members
- v. The organisation (stewardship responsibilities toward what is, in many instances, a legally separate and distinct entity)
- vi. Venture partners
- vii. Regulators (as guardians of the broader public interest)

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

From O group's perspective, the duties of responsible individuals in a NFP can be encompassed in three broad categories: *economic responsibilities*, *legal responsibilities*, and *ethical responsibilities*. Arguably, a fourth category could be introduced; that of *altruistic responsibilities*, however arguments for and against such responsibilities are far more contentious than for the original three.

Due to the importance of its 'social contract' a responsible individual within a NFP, in particular, has responsibilities that go beyond (i.e., are in *addition* to) his fiduciary obligations to the entity.

With regard to the core duties that should be outlined within the ACNC legislation, O group maintains that the following duties should apply.

Economic responsibilities

A duty to ensure that the organisation's operations:

- i. provide goods and services of real value to beneficiaries and other consumers;
- ii. earn a fair return on the funds invested in the organisation;
- iii. do not put the organisation's assets in a position of intolerable risk; and
- iv. do not negatively impact broader social economic welfare.

Legal responsibilities

A duty to comply with all applicable legislation, regulations and standards (incl., accounting and financial disclosure) as the floor, or moral minimum, for the organisation's conduct.

Ethical responsibilities

- i. a duty of reasonable care and diligence to the entity and its stakeholders;
- ii. a duty to act with honesty and sincere intention (i.e., in 'good faith'), taking into account the best interests of the entity and the minimisation of any social harm or injury;
- iii. a duty to not misuse one's position to improperly gain a direct or indirect advantage or to cause social harm or injury;
- iv. a duty to not misuse information to improperly gain a direct or indirect advantage or to cause harm or injury to the entity or to broader society; and
- v. a duty to disclose material interests and to avoid and manage conflicts of interest.

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 standard of care required of a responsible individual within a NFP must necessarily be determined by circumstance. That is, circumstance created by that entity's social and economic power and by the degree of public investment in the entity. Attempting to 'scale' the various levels of care required to comply with any duties would prove impracticable, and ultimately risky.

There is presently no clear legal distinction between the standards of care expected of the various types of directors that fall under ASIC's jurisdiction; be they a director in the generally accepted sense, or a de-facto, shadow, nominee or alternate director, or be they a senior officer of the entity. Similarly, there is no distinction between the standards of care expected of a director who is remunerated and a director who is not.

This seems to reflect the view that if a person accepts a directorship then they accept the inherent duties and responsibilities that go with that position. A mitigating factor in law has been, and assumedly will continue to be, the degree to which a particular director or officer could reasonably be expected to have knowledge of certain information or be aware of particular events or situations.

On this basis, O group does not believe there should be a higher standard of care for one group of responsible individuals vis-a-vis another. According to the same principle, nor does O group believe that there should be a higher standard of care expected of professionals than of lay persons. All recognised professional bodies have in place respective codes of conduct and sets of standards, such that a genuine professional is already held to (and accountable to) a high standard. Imposing greater levels of accountability on such professionals will only succeed in discouraging professionals from becoming directors of NFPs, an outcome that is entirely counterintuitive to improving the governance standards and practices of NFPs.

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. NFP Boards of Management should continue to be educated on the vital importance of recruiting directors and senior officers with the relevant skills and experience based on the needs of the organisation.

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

No. It makes little sense to have only some of the organisation's responsible individuals focused on compliance with the standards. Turnover of directors and senior officers may also create issues for compliance at a point in time.

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

No.

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. Our response to items 2, 3 and 4 above encompasses the required obligations and considerations.

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

Consideration should be given to the different types of publicly-funded government assistance provided to NFPs.

O Group is of the view that the public interest in funding provided in grant form should be 'weighted' differently to that for funding provided in the form of fee-for-service payments.

Ultimately, funds granted to a NFP are held in trust by that NFP until they are appropriately acquitted, whereas funds received as a fee-for-service are essentially a mix of reimbursement and reward for funds already expended in delivering a service required by government. If these differences are not considered, the ACNC will be faced with the dilemma of how to administer fee-for-service payments made by government to private firms (as is common practice in the employment services, health, child and aged-care industries etc.).

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 posited by O group at item 3 above are based on existing requirements under the *Corporations Act* and on corporate social responsibility principles broadly accepted in contemporary business ethics theory.

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

Different types and sizes of organisations will necessarily have different requirements for governance structures and control systems. As noted at item 107 of the consultation paper, a tiered/proportional reporting structure will be necessary to accommodate these differences.

To varying degrees, O group believes that the following categories and cornerstones of effective governance should be reported upon by NFPs.

Governance systems:

Governance structure (incl. committee activity)
Decision-making hierarchies and systems

Planning and control systems:

Financial control and planning systems
Performance control and planning systems

Integrity systems:

Reward systems (NB. not, per se, the remuneration of responsible individuals)
Related-party transaction declarations
Conflict of interest declarations

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

Only for the top-echelon of NFPs in the nation, where remuneration packages are likely to be substantial and comparable with those of some public companies.

Attracting talent to the NFP sector has been, and will continue to be, an ongoing and significant challenge. Most NFPs are not in a financial position to remunerate their responsible individuals to the level that for-profit firms in general are able to. Publicly disclosing remuneration levels of responsible individuals (which some would argue to be an invasion of privacy) will very likely act as a disincentive for attracting talented individuals to the sector.

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

Yes.

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)?

Yes, if one accepts the principle that a responsible individual must not take advantage of their position to gain, directly or indirectly, a personal benefit or a benefit for any associated entity, as proposed at item 126 of the consultation paper.

In certain circumstances, such as the native title example cited, it may be sufficient merely to publicly declare the level of interest/gain that a responsible individual has in a matter, and to thus leave it up to the NFP's Board of Management (acting as any reasonable person would act) to determine how such an interest should be managed or dealt with.

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'?

No. It should be based on the *Corporations Act* model as is currently applicable to companies limited by guarantee.

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

Nil. Our response at items 9 and 11 above should be sufficient to cater for all circumstances.

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. However, the ACNC should respond to any concerns it may have regarding an NFP's good governance systems as declared per item 11 above.

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

Yes, for government funded NFPs. Many government funding contracts for NFPs currently impose this obligation as a matter of course anyway.

No, for NFPs that do not receive government funding. The cost to NFPs will be inhibitive and O group is not aware historically that real actual losses incurred by NFPs experiencing “unforeseen circumstances” is sufficient to justify the additional cost imposition.

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

Yes, but subject to the scope and scale of the NFP’s activities and risk exposure, as broadly inferred in the consultation paper.

20. What internal review procedures should be mandated?

Derived from our response at item 11 above, and noting the observations at item 148 of the consultation paper, O group believes that internal review systems could be mandated, **on a tiered/proportional basis**, focused on the entity’s *governance, planning and control*, and *integrity systems*.

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

- i. prevention from distributing profits or assets for direct or indirect personal gain of an individual or restricted group of individuals;
- ii. provisions for altering the constitution;
- iii. provisions for access to membership;
- iv. provisions for appointment and removal of directors;
- v. governance arrangements;
- vi. member rights and dispute resolution;
- vii. financial management and control arrangements.

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, but only on a broad principles basis applicable to categories of entities (i.e., not on an individual case-by-case basis).

23. Who should be able to enforce the rules?

The ACNC Board of Directors or delegated committee of the Board of Directors. Specifically, not solely officers of the ACNC.

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

Enforcement of the rules, yes. Alteration of the rules, no; unless of course any alteration of the rules by members places those rules in contravention of any 'model core minimum requirements' for governing rules.

25. Should model rules be used?

Yes. 'Model core minimum requirements' for governing rules, based on those outlined at O group's response at item 21 above.

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

- i. removal of membership
- ii. minimum rights of membership
- iii. member dispute resolution

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

Nothing to contribute.

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

Yes, but only in relation to the minimum frequency of member and of directors' meetings.

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

For small NFPs, who are often entirely volunteer-based and who often do not have 'professional' representation on their Boards of Management, having easy and ready access to the ACNC as an advisory body would be of significant value. The ACNC could not only take on a role of driving the general development of NFP governance practice, but of also acting as an immediate source of advice on constitutional and governance issues for NFPs.

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?

In reality, it is most unlikely that the imposition of NFP registration and governance arrangements pursuant to the ACNC's brief will lead to any meaningful reduction in red-tape for the broader NFP sector.

In some instances, the largest NFPs, who invariably operate across multiple jurisdictions, may realise some efficiencies through the consolidation of regulatory arrangements. However, for the vast majority of NFPs in Australia, who do not operate across state boundaries, the proposed arrangements will undoubtedly add to the existing levels of “red- tape”.

The challenge for the government and the ACNC is to minimise any unnecessary or counterintuitive obligations being placed on NFPs. Whilst O group supports the introduction of the ACNC and its objectives, as its own practices already mirror the intended standards, for those NFPs that do not presently have such regimes in place, the challenge lies in convincing them of the necessity for, and the validity of, the higher levels of obligation on responsible individuals within their organisations.

The introduction of proportionate/scaled obligations will be absolutely imperative to achieving a successful outcome.

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

This has already been addressed in our response to the preceding 30 questions/items.

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

Nothing to contribute.

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?

O group is of the view that issues relating to the probability of increased legal liability for responsible individuals as a consequence of the introduction of centrally controlled, higher level standards and obligations must be explored.

Whilst as yet uncertain, a potential outcome from such a move is a proportionate increase in the difficulty for NFPs in recruiting and retaining suitably educated and experienced individuals to important positions.

Mr. Andrew Billing
Chief Executive Officer
0419 318 232

Mr. Tony Read
Corporate Analyst
0408 850 097