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25 January, 2012

Mr Chris Leggett
Manager
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Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: NFPReform@treasury.gov.au

Dear Chris,

Re: *Consultation Paper, Review of Not-for-Profit Governance Arrangements* and *Exposure Draft – Australian Charities and Not-for-Profits commission Bill 2012*

Thank you for the opportunity to comment on the above Consultation paper and Exposure Draft.

Philanthropy Australia is the peak body for philanthropy in Australia; its mission is to advance philanthropy, which Philanthropy Australia defines as "*the planned and structured giving of money, time, information, goods and services, voice and influence to improve the wellbeing of humanity and the community*". The philanthropic sector comprises an estimated 5,000 entities which collectively provide over $500 million of funding per annum for the public benefit.

While the philanthropic sector represents only around 10% of tax concession charities, our submission also stems from our role as the peak body for organisations which deal with (mainly charitable) not-for-profits (NFPs) on a daily basis in order to achieve their charitable mission. The philanthropic sector therefore has a solid understanding of issues which impact not-for-profit organisations in general; it also has an interest in ensuring that the sector is well-resourced, well-run and well able to carry out its work to benefit the community.

Philanthropy Australia's submission makes some general comments on the principles-based approach and then responds to each of the themes raised in the Discussion section of the paper, with answers to some specific questions.

General comments on Consultation Paper and Exposure Draft

Philanthropy Australia agrees fully with a principles based approach to reform. In accord with government not-for-profit reform process we believe that the core principles should be:

1. Reinforcing public confidence in the sector
2. Report once, use often
3. Reducing red tape
4. Proportionate and common sense reporting and regulation

Philanthropy Australia strongly supports a principles-based approach to developing guidance to the sector, rather than a prescriptive approach. This is in line with the sector's view as expressed through submissions to the Scoping Study for a National Not-for-Profit Regulator and summarised thus in Treasury's final report on that study:

> *Respondents to the consultation paper were asked about the appropriateness of the core rules and the regulatory framework as proposals to improve governance. There was broad support from 31 submissions for the suggested core rules and regulatory framework, while 35 submissions opposed specific rules like the power to suspend NFP officers and impose a decision-making structure. Those respondents preferred that the Corporations Act be used as a model and that a principles-based, not prescriptive, approach be taken. Twenty two submissions completely opposed the suggested core rules and the regulatory framework*[1].

It is our view that the Consultation Paper, while it refers to a principles-based approach, is assuming a prescriptive approach. Many of the questions asked in the Consultation Paper should properly be left to the governing boards of individual organisations, rather than forming part of the legislative framework. There is a vast range of entities in the NFP sector with many different, but effective, governance models. Many organisations and peak bodies have devoted considerable time and energy to the development of these models. It would be a drain of scarce time and resources to force organisations to discard their established practices and adopt an imposed "one size fits all" model.

Philanthropy Australia is of the opinion that the legislation should establish the high level principles but not mandate the details of how individual directors respond to that framework. Compliance guidance and checklists should be encouraged for all entities but not required. It is essential that directors seriously read and consider the governance principles according to their own entity. We would see it as counterproductive to the reduction of red tape and to the overall integrity of the NFP sector if the introduction of a complicated system of mandatory practices distracted directors from the principles of their fiduciary responsibility and commitment to the community, to focus on a "box ticking" compliance approach. The balance needs to be right. Avoidance of unnecessary complexity enables each organisation to make decisions about its internal governance regime based on the best approach for its own particular circumstances.

Finally, Philanthropy Australia has serious concerns that there will be doubling up of regulation and reporting which will prove burdensome for the sector. In particular, there is no provision in the Exposure Draft for interaction between the ACNC and other regulators apart from broad information sharing powers.

Philanthropy Australia recognises that the timetable for reform is as compelling for the Implementation Taskforce as it is for the sector, and that there are still many detailed negotiations between various agencies to be conducted. However, it is vital to sector confidence that there be a reduction in the regulatory burden, in line with the principles underpinning the entire reform process. It seems that without an accompanying harmonisation of fundraising regulations, NFPs will still be reporting to their

[1] *Scoping Study for a National Not-for-Profit Regulator,* p.59 (http://treasury.gov.au/documents/2054/PDF/20110706%20-%20Final%20Report%20-%20Scoping%20Study.pdf accessed 17/1/2012)

respective fundraising regulators as well as to the ACNC; Public and Private Ancillary Funds will still be reporting to the ATO as well as to the ACNC; and those entities which must report to other agencies will still be doing so (such as entities on the Register of Environmental Organisations, which must report to the Department of Sustainability, Environment, Water, Population and Communities).

This is clearly a situation which will be burdensome to the sector and could potentially damage sector confidence in the ACNC. Given the existence of parallel legal regimes at State and Territory level, Philanthropy Australia urges caution until a co-operative arrangement with the States and Territories has been established.

Exposure Draft: Australian Charities and Not-for-profits Commission Bill 2012

With regards to the Exposure Draft Philanthropy Australia has identified the following specific issues:

A) **Distinction between charitable and non-charitable entities**: The Bill appears to be intended to apply to all NFP entities, but the Fact Sheet supplied with the exposure draft indicates that the ACNC's functions will initially apply only to charities. The Bill itself does not make specific reference to charities. Philanthropy Australia agrees that a stepwise approach to reform is vastly preferable to an attempt to regulate all NFPs at once and urges that this should be specified within the Bill itself, to clarify that the Act will, on commencement, apply to all entities claiming charitable status for the purposes of obtaining Commonwealth tax concessions, and that the Act shall apply to other classes of NFP entities by a specified date.

B) **Entitlement to registration**: Philanthropy Australia believes that the condition of registration that the entity has not been previously registered will fail to achieve its purpose and will be unworkable in practice. If an individual inappropriately manages an entity, the appropriate remedy is to suspend or remove that individual and possibly to bar him or her from future management of such entities. If an entity breaches the Act and therefore has its registration revoked, barring it from applying for reregistration is punishing the entity for the misconduct (whether inadvertent or deliberate) of the responsible individual(s) responsible for the breach. It will not provide effective protection of the entity's mission and may be to the detriment of the entity's beneficiaries or members. Irrevocable revocation of an entity's registration is the "all or nothing" approach which Treasury sought to avoid in its new regulatory framework for Private Ancillary Funds. This is particularly pertinent to the area of charitable trusts, where the court has powers to enforce and vary the terms of a charitable trust to prevent its failure. A charitable trust which has its registration revoked will continue to exist and to carry out its mission but the inability to re-register and therefore access tax concessions will be to the detriment of the trust's charitable beneficiaries.

   Recommendation: The condition of registration that the entity has not been previously registered should be removed.

C) **Section 5-10**: This section refers to "the governance requirements set out in the governance section of this Act"; however, the draft Bill does not appear to contain a governance section.

Presumably this is because this section will be inserted at a later date after the consultation on the governance of not-for-profit entities.

D) **Revoking registration of entities:** Philanthropy Australia has concerns about the low threshold for deregistration in the draft Bill. In particular, section 10-55 (1) (c) indicates that an entity may have its registration revoked if it fails to comply with the Act or the regulations, which enables the regulator to revoke registration of an entity for minor breaches. Given the consequences of deregistration, Philanthropy Australia does not believe this low threshold can be justified.

Recommendation: that the regulator adopts the New Zealand provision[2] which requires a "significant or persistent" failure to meet legal obligations before an entity is deregistered.

E) **Section 55-5**: It is unrealistic to expect reporting by 31 October for the following reasons:
- Charities' investments often held in Investment Trusts, which often do not provide comprehensive year-end reporting until mid-to-end- September.
- Most charities rely on pro bono or heavily discounted services from accounting and auditing firms. Accountants and auditors are generally busy with commercial clients at the immediate post-financial year period and often not available to provide pro bono services at this time. This means that the charitable clients must either pay extra costs for services they have received pro bono, or risk late reporting and the associated penalties.

Recommendation: that reporting be required by 28 February in the following financial year. This is the date upon which Public and Private Ancillary Funds are required to provide their information returns to the ATO.

F) **Section 55-90**: This section states that the Commissioner may allow an entity to adopt a different accounting period. Philanthropy Australia cannot see why it should be necessary for an entity to request permission from the Commissioner to use a different accounting period, and points out that for certain entities it will be problematic to adopt a financial year reporting period (such as, for example, school building funds which use the school year as their reporting period). Retaining sub-clause (3) which enables the Commissioner to make directions that are reasonably necessary in relation to the accounting period should be sufficient to ensure that the Commissioner can appropriately monitor the entity in question.

G) **Section 120-10**: Sub-clause (4) in this section makes it clear that the Commissioner can require an individual to provide information, and that failure to comply is a strict liability offence. Philanthropy Australia is concerned at this sweeping power which does not seem to have any restrictions, other than that the Commissioner can only exercise this power for the purposes of the Act. There is also no clear procedure for challenging a direction or seeking a review of this decision.

[2] *Charities Act 2005* (New Zealand), s.32

H) **Section 210-10**: Philanthropy Australia welcomes the tiered approach to reporting. However, the requirement that all entities which are deductible gift recipients (DGRs) are automatically considered *medium registered entities* even if their revenue is extremely small seems inconsistent and is likely to impose a heavier than necessary regulatory burden on many small entities. If the tiers are based on revenue, then revenue should be the *only* deciding factor in whether an entity is classified as small, medium or large. If the justification for deciding which tier an entity falls under is based around its access to public funds, then this is part of a larger process which includes the reform of fundraising regulations.

Recommendation: that the definition of small, medium and large entities only be based on the revenue of the entity in a financial year.

Review of not-for-profit governance arrangements

Responsible individuals' duties

Philanthropy Australia suggests that the use of the term *responsible individuals* is problematic in this context and will lead to unwarranted confusion. It is confusing because there is already a term *Responsible Person* in widespread use in the sector, which has a specific legal meaning[3]. Using the nearly identical phrase *responsible individuals* to indicate the directors, officers, trustees and a very broadly defined category of decision-making persons with an entity which may also have legally defined *Responsible Persons* on its board will be confusing. Philanthropy Australia suggests instead using the term "directors" and providing a definition of the term.

Paragraph 102 of the Consultation Paper suggests that:

> *"under a principles-based approach, a responsible individual would need to act with, for example, care and diligence, however the standard of care and diligence expected of the particular individual would depend on the size of the entity, the amount of public monies the entity is the recipient of, the qualifications of the individual, the position they hold, or the risk of the entity's activities."*

Philanthropy Australia believes this to be incorrect. Under a principles-based approach, the level of care and diligence must apply across the board, regardless of the entity's size or the amount of public monies it is the recipient of. Philanthropy Australia is aware of, for example, a large number of charitable trusts established by will, which do not fundraise and receive no public monies, are relatively small in size and conduct low-risk activities mainly involving the distributions of monies to eligible recipients; but the individuals responsible for the governance of those entities are held to no less a standard than those engaged in fundraising campaigns, nor should they be.

However, Philanthropy Australia believes that while the level of responsibilities of directors is not scalable, how those responsibilities flow into paperwork certainly is. Therefore while the standard of care

[3] The definition of who is qualified to be a Responsible Person varies slightly (for example, between Private and Public Ancillary Funds, between the Register of Environmental Organisations, and others)

expected of a smaller organisation is still high, the level of financial and other reporting required of them should be proportional to risk, the entity's size and its receipt of public and government funds.

Answers to specific consultation questions

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

No. There is a very wide range of entities and purposes in the not-for-profit sector and it is doubtful that a piece of legislation would be able to cover all stakeholders of all types of entity succinctly. The question of to whom an entity owes its legal duties is a complicated legal question. Will the answer to this question, for example, indicate who is able to bring a legal action against an entity for breach of duty? Philanthropy Australia considers this level of detail is better left to guidance than to legislation.

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?

The primary duty of responsible individuals is to consider the mission and purpose of the entity. The wide range of entities and purposes in the NFP sector means that stakeholders will vary significantly between entities. In the particular case of trusts, there is an overriding duty to preserve the trust.

Recommendation: The legislation should require NFPs' responsible individuals to determine who they must consider when exercising their duties, and should also require directors to review this list regularly. Philanthropy Australia regards a guiding principle in this regard to be that provided by the Council on Foundations Trustee Principle:

> "We hold ourselves responsible to those who created us, those with whom we currently interact, and those who may look to us in the future."

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

Philanthropy Australia suggests that the Investment Management Code of Conduct for Endowments, Foundations, and Charitable Organisations[4], makes a very good basis for the duties of all directors and can be adapted for use by NFPs:

> *A. Act with loyalty and proper purpose.*
>
> *B. Act with skill, competence, prudence, and reasonable care.*
>
> *C. Abide by all laws, rules, regulations, and founding documents.*
>
> *D. Show respect for all stakeholders.*
>
> *E. Review investment strategy and practices regularly*

[4] http://www.cfainstitute.org/learning/products/publications/ccb/Pages/ccb.v2010.n15.1.aspx accessed 24 January, 2012

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 should be akin to that of a "reasonable person" as defined under the Corporations Act and supported by the common law. The standard of care must apply across the board irrespective of whether the individual is paid or a volunteer.

With regards to professional qualifications, Trust Law is clear that because a professional trustee represents itself as possessing superior skills to non-professional trustees, there is a corresponding higher duty of care, irrespective of whether the trustee is paid[5].

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)?

Philanthropy Australia believes that there should not be a blanket requirement for directors (see p.1 about the confusion inherent in the term "responsible individual") to hold particular qualifications. Staff and board recruitment is already particularly difficult for NFP organisations and introducing more stringent requirements would be difficult to fulfil for many organisations without major changes, particularly for small organisations or those in rural and remote Australia where qualified persons are scarce and generally overcommitted.

However, this does not preclude those who are required to hold particular qualifications under other laws (such as State-based trustee legislation) to hold the appropriate qualifications, such as the Responsible Person for a PAF.

Recommendation: That the legislation require the entity's governing body to regularly assess the skills and expertise of its directors and determine whether they remain sufficient for the size and nature of the entity.

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

Philanthropy Australia feels that this will depend on the extent of the standardised requirements. Given the enormous diversity of the sector, if there are very specific mandated duties, this will detract from good governance by imposing new regimes on existing effective governance arrangements, resulting in a greater compliance burden. Some entity types, particularly trusts, already impose greater or higher duties.

Philanthropy Australia supports a principles approach, allowing organisations to develop the most appropriate specific duties.

Recommendation: That requirements remain at a high level, laying out underlying principles but leaving the specifics of how the principles translate into practice to the governing bodies of individual organisations.

[5] Dennis Ong, *Trusts Law in Australia* (3rd edn) p. 225

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

Philanthropy Australia queries how a "higher risk NFP" will be defined, as this is a vague concept and depending on the definition of "risk" it could be applied to many NFPs of diverse sizes and missions. Does this mean, for instance, that NFPs which support innovative and untried approaches, allowing them to be nimble and responsive to community needs, are considered higher risk?

We believe that provided the approach is principles-based, the principles should apply to all NFPs. There will be entities whose own structure will impose higher governance standards – such as philanthropic trusts whose trustees have fiduciary duties. There will also be entities whose size and activities require a higher level of financial and other reporting, but it is important to distinguish between the standard of care and the reporting requirements.

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 not be based on the requirements applying to trustees of charitable trusts, as there are additional requirements and qualifications for those individuals under state-based trustee laws, which would be too onerous for organisations across the board.

Recommendation: Philanthropy Australia suggests that the Investment Management Code of Conduct for Endowments, Foundations, and Charitable Organisations[6] , makes a very good basis for the duties of all directors and can be adapted for use by NFPs:

A. Act with loyalty and proper purpose.

B. Act with skill, competence, prudence, and reasonable care.

C. Abide by all laws, rules, regulations, and founding documents.

D. Show respect for all stakeholders.

E. Review investment strategy and practices regularly.

Disclosure requirements & managing conflicts of interest

Philanthropy Australia strongly advises that consideration should be given to certain classes of NFP having exemption from making available to the public certain information such as contact details and names of directors. In particular, it will be exceptionally difficult to find philanthropic individuals willing to establish Private Ancillary Funds and other private charitable trusts if they know that their trust's contact details and their names will be made available via a simple public search enabling them to be identified as decision-makers of philanthropic trusts.

[6] http://www.cfainstitute.org/learning/products/publications/ccb/Pages/ccb.v2010.n15.1.aspx accessed 24 January, 2012

Philanthropy Australia has been advised by some members that they would regard it as necessary to close their PAF if their relationship to it as individuals were made public. This would be a significant loss to the NFP sector; while it would mean a short-term injection of funds to NFPs as those PAFs spent their capital, it would mean a very great loss in the longer term. Ultimately it would mean that funds which had been irrevocably sequestered for the community, to provide substantial long-term public benefit, would no longer exist and there would be no incentive for new funds to be created. Furthermore, existing PAFs which choose to continue may find it difficult to source directors.

Philanthropy Australia agrees fully with the principles of accountability. An entity which receives public money – ie, which actively solicits for donations – should be accountable to the public, and indeed if it is not then it may have some difficulty in surviving. However, an entity which does not seek or receive public funding or government grants, and whose main benefit is in government tax concessions – ie, PAFs and charitable trusts – should be accountable to the public via its reporting to the ACNC, rather than directly through public reporting.

PAFs in particular already have significant accountability; they must file annual tax returns and audited financial statements with the ATO. When the PPF structure, the forerunner to the PAF, was reviewed by Treasury in 2009, Philanthropy Australia and many others made strong representation that contact details and directors' names should not be made public and that to do so would impose a significant administrative burden upon PAFs (as charities rushed to solicit donations from them) without one extra dollar being contributed to the community sector. Philanthropy Australia's 2009 submission in response to the paper 'Improving the Integrity of Prescribed Private Funds' stated:

> Philanthropy Australia supports increased transparency for the sector as part of reinforcing good governance principles. However, there are practical issues in terms of capacity to manage volumes of unsolicited enquiries and applications, as well as issues for resource strapped not-for-profits in making grant applications when there is no chance of success. The vast majority of PPFs have deliberately remained administratively small in order that the maximum level of funding goes to charitable organisations. Mandating the release of such details would be an intrusion and would be an additional disincentive to philanthropy. The costs of managing requests would dramatically increase for most PPFs with no increase in distribution. Expectations of eligible charities would also be raised.

That is still our view and Treasury ultimately did not require the disclosure of these details for Private Ancillary Funds. It would be a major setback for the ongoing growth of philanthropy and therefore for the community sector if the good work done jointly by Treasury and the sector in 2009 to ensure the future health of philanthropy were to be overturned.

Philanthropy Australia has serious issues with the contact details, directors and financial details of *all* registered entities being made available to the public regardless of whether they control funds from the public, and feels that in the case of Private Ancillary Funds (PAFs) in particular, this is a breach of privacy.

Recommendation: That there be provision in the registration and reporting framework for entities which do not solicit or receive public donations (including Private Ancillary Funds and charitable trusts) to

request that their contact details and directors' names are not made publicly available via the ACNC public information portal. By requiring all organisations raising funds from the public to meet the ACNC disclosure requirements the ACNC is positioning itself to assume the role currently undertaken by the state fundraising licences in a way that will reduce red tape and duplication without burdening those organisations which do not fundraise with extra compliance and reporting. This will be a significant positive step forward for the sector.

Disclosure requirements and managing conflicts of interest: Responses to specific consultation questions

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

The directors of registered entities should be required to sign a statement which acknowledges either that the entity agrees adopt the principles stated in legislation (ie a Code of conduct), or that its own internal code of conduct complies with the principles stated in legislation. See the CFA Institute acknowledgement form for an example[7]. Many organisations and peak bodies have done significant work on developing codes of conduct and it makes sense to work with those frameworks.

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

Philanthropy Australia advises against disclosure of remuneration. One of the ACNC's primary purposes is to reinforce public confidence in the sector, and remuneration figures taken out of context could lead to significant confusion. For example, some not-for-profit entities are in direct competition with for-profit entities to obtain the correct level of expertise in their boards. The only way for many of these entities to obtain appropriate levels of expertise is to remunerate their directors as their for-profit competitors do. Without understanding this contextual background it may be difficult for the public to understand whether the level of remuneration is reasonable.

Philanthropy Australia notes the parallel issue of confusion around administrative overheads of charities, with the lowest level of overheads frequently reported in the media and taken by the public as the main mark of a charity's effectiveness although, as the Productivity Commission into the Contribution of the Not-for-Profit Sector reports, "[p]ressures to be more efficient have seen overhead spending reduced at considerable detriment to effectiveness"[8].

Recommendation: that remuneration of responsible individuals not be required to be publicly disclosed. In the event that the ACNC chooses to require disclosure, it should be phased in with a possible first step being to indicate remuneration in bands, as was required in the corporate sector. Any move down this path should be accompanied by a public education program emphasising the complexities and contextual background.

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

[7] http://cfainstitute.org/ethics/Documents/Codes%20Documents/endowments_code_acknowledge_form.pdf
[8] Productivity Commission 2010, Contribution of the Not-for-Profit Sector, Research Report, Canberra, p.13

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)?

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'?

These three questions are best addressed by individual organisations according to their own needs and resources. Philanthropy Australia would advise against being too prescriptive in the legislation as this may cause unintended negative consequences for the sector.

Risk management: general comments

Paragraph 136 of the Consultation paper states that "Insurance is an effective way to manage risk within an entity". Philanthropy Australia proposes that this is incorrect. Insurance is an effective way to cope with, or minimise, the impact of risk, but it is not a way to manage risk. Entities should be required to have appropriate policies in place proportionate to risk.

Risk management: responses to specific consultation questions

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

It is important to acknowledge that not all NFPs control funds from the public or solicit donations.

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

Broad requirements are preferable to particular requirements. Investment strategies should not be necessary across the board. There will be some subsets of NFPs which must have investment strategies, including philanthropic trusts. However, the 2009 report Managing in a Downturn commissioned by Pricewaterhousecoopers, the Fundraising Institute Australia, and the Centre for Social Impact[9] indicated that across the sector only about 5% of NFP income derives from investment activities, meaning that for the majority of sector organisations an investment policy is unnecessary.

In the case of ancillary trusts (both public and private) the necessity for an investment policy exists already in their respective guidelines, and for other trusts it is covered in trustee law. In some charitable trusts, particularly those created by will, there are prohibitions on certain types of investment or on disposing certain assets. This creates complexity and also impacts any investment policy created. Furthermore, there will be major issues for philanthropic trusts in disclosing investment strategies or even policies, as much of this is commercial and in trust.

For other NFPs, producing an investment strategy, if appropriate, is a natural consequence of a responsible director applying a duty of care.

[9] http://www.csi.edu.au/site/Knowledge_Centre/Asset.aspx?assetid=bdaa827e87c89d3e, accessed 24 January 2012

Recommendation: That there be no mandated requirement for an investment policy. Rather, the legislative framework should require directors to have in place appropriate strategies for managing the financial and other assets of the organisation, and to review those strategies regularly.

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

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

In answer to both questions, there should be a broad requirement for NFPs to have risk management plans and procedures in place, but no detailed requirements for insurance (for example); these matters are best left to the directors of each individual organisation.

Recommendation: There is an existing risk management standard, AS/NZS ISO 31000-2009 Risk Management – Principles and Guidelines[10]. Philanthropy Australia suggests adopting this principle. Philanthropy Australia understands that Standards Australia has released a Guide for Managing Risk in not-for-profit organisations, to provide guidance around this standard.

Minimum requirements for an entity's governing rules: general comments

Firstly it is important to consider that for trusts, the governing rules are already established by the trust instrument and that incorporated associations legislation already requires fundamental matters to be regulated for those organisations.

Secondly, protecting the mission of the entity is the job of the directors/board/office bearers rather than the ACNC. Philanthropy Australia believes that the ACNC should provide good governance principles and require entities to report against them using the "if not, why not" reporting approach as recommended by (amongst others) the ASX Corporate Governance Council, which provides a flexible and robust approach.

Relationship with members: general comments

A membership-based entity is accountable through its members, and the entity's constitution will set out the rights and obligations with regards to members. Additional regulation for those entities is not required.

Relationship with members: responses to specific consultation questions

20. What internal review processes should be mandated?

There should be a requirement for regular review, but again no mandatory processes as this will depend on the size and nature of the organisation.

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

[10] http://infostore.saiglobal.com/store/Details.aspx?ProductID=1378670

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

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

These issues could be contained in model rules. Relationships with members should be managed via the organisation's constitution, which will also stipulate the number of meetings, etc, and windup clauses.

24. *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?*

Philanthropy Australia recognises that the ACNC Implementation Taskforce and all involved with the establishment of the ACNC have a substantial task before them with strict timeframes, which has led to a demanding schedule of consultation and implementation for both the taskforce and the sector. We also recognise that there will be a difficult transition period as the ACNC and its systems come up to speed.

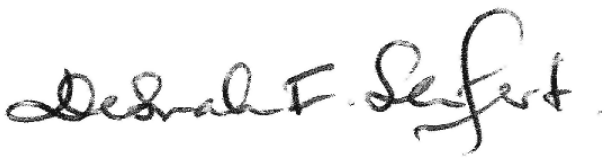
However, it is crucial for sector confidence that there be as little duplication as possible of paperwork and reporting. For example: Public and Private Ancillary Funds have an annual reporting requirement to the ATO. Any reporting to the ACNC must even at the outset replace this, rather than be in addition to it.

The best way to ensure that there will be a reduction in red tape is for the ACNC, in consultation with other agencies, to remove conflicting, contradictory and duplicative reporting requirements.

Closing remarks

Philanthropy Australia welcomes the Exposure Draft and Governance Paper, and the principles underlined therein. We are particularly appreciative of the phased approach to regulation, the "one-stop-shop" approach and the desire to minimise the regulatory burden on NFP organisations. We will be pleased to comment on any of the matters raised in this submission and look forward to a productive relationship with the ACNC leading to a robust and effective not-for-profit sector which ultimately benefits all Australia.

Yours sincerely



Dr Deborah Seifert
Chief Executive Officer