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# NOT FOR PROFIT GOVERNANCE ARRANGEMENTS

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Aid For The Blind (Qld) Inc response

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This is the response of Aid for the Blind (Qld) Inc to the request for submissions on this Government discussion paper. Our organization is a charitable organization incorporated under the Incorporations Associations Act of Qld, whose headquarters are based in Cameron St, Fairfield, Brisbane



**Ald for the Blind (Qld) Inc.**

*My Fingers Are My Eyes*

## **NOT FOR PROFIT GOVERNANCE ARRANGEMENTS; DUE 6 JANUARY 2012.**

1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties?
  - *This should not be necessary as the “responsible individuals” should have that knowledge before they assume the roles. Additionally and more importantly there may be different duties owed to different persons or bodies, and legislation cannot cover that with precision (and still be workable)*
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 need to first consider the purpose and mission of the entity which should be sufficiently clear as to duty*
3. What should the duties of responsible individuals be , and what core duties should be outlined in the ACNC legislation?
  - *These duties should be fiduciary duties subject to any over-riding Corp’s Law duties; if any assertion is required in the legislation it should remain as “fiduciary duties” except if it is decided that certain Corp’s Law duties over-ride same.*
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 is merely the fiduciary duty expected of such a position together with the skills and duties of the reasonable person occupying the particular position. There should not be different standards for paid/volunteer or professionals/lay persons.*

*The reason is that it is often difficult to attract skilled persons onto boards, and they are often directors or business-people anyhow. If they feel they are taking on another set of high standard obligations other than a moral or charitable purpose they may be averse to volunteering their time on a charity board. We then lose that experience and the connections coming from such people*

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)?
  - *This is a matter for each charity to decide, rather than legislation. Charities will often look to certain people or occupations for new members and so select for their use*
6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?
  - *If minimum standards are to be adopted they should be applied to all the responsible entities; to do otherwise creates a rift in the board/structure and division amongst who will do what!*
7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?
  - *Yes, as outlined in (3) a common duty could be fiduciary but there may be the need for other duties or obligations depending on structure or reporting and other requirements.*  
*It would be good to have a uniform set of duties!*
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?
  - *At a low-level but practical level, many board members, often volunteers have limited understanding of the structure they are part of. They do not in their workday lives encounter the broad spectrum of law and "charity" that management deals with.*
  - *As such there should be an obligation (often recommended in best practice journals) for each new member to be provided with copies*

*of constitution /similar document, financial records and list of members and positions.*

- *Also the responsible individuals should be given a list/explanatory note of fiduciary and other duties, as well as a note of the “date requirements” AGM, financial records and reporting, and the like obligation*

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

- *NFP’s either receive government funds or have to be self or privately funded. If the NFP is govt funded then the govt will impose certain conditions on the funds use and reporting. As such it seems unlikely that there needs to be a split in standards of care.*
- *All NFP’s would need to follow their constitution or founding articles so this step is transparent to anybody checking performance. The actual performance is measured for instance by workers dealing with the children at risk or housing requirements or other issues. There is a range of structures and of aims so it is not an easy task to split duties and standards.*

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?

- *Under the ideas advanced in this discussion paper there is a preference to a single system even if the actual structure adopted is based on state or federal laws. The duties should, so far as possible be all the same regardless of the structure. Our preference is a fiduciary duty based system*

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

- *Required information should include audited (or if no obligation to audit) end of financial year returns; and employee and board payments and benefits including rights of use of equipment (eg ITAA s99 - 100 trust benefits), as well as any-related party exchanges (payments, contributions, facilities)*

12. Should the remuneration (if any) of responsible individuals be required to be disclosed?
- *Yes, as that comes from funds donated or gifted for a charitable use. Part of the transparency “dissection” involves what administration costs and other expenses are involved.*
13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?
- *At Discussion paper Para 124 reference is made to fiduciary duty; this should sufficiently govern the duties. This does include a need to disclose any personal conflict.*
  - *A concern is that it might not be considered to extend to declaring interests of family and other close entities. If that point can be assured then fiduciary duty is appropriate (see my earlier comments in section 1) without extra statutory wording.*
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)?
- *This is very difficult; the open answer is yes, but in a “closed group” entity the members might all be related. There are some organisations where the membership comes from a close group where most are related in family sense so responsible individuals and beneficiaries are from one extended family. This may produce a disclosure but still require voting/decisions being made by the individual. In this situation of closed society members, a relaxation of rules may be required. That relaxation would need to be statutorily framed and the issue made public.*
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”?
- *This should be based on Corp’s Act “material personal interest.”*
16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?
- *Audit requirements should be required for all NFPs or end of year financial reports. Also government funding usually has specific*

*reporting requirements. Where funds are provided by the public even a large private donation such reporting is not usually reported back to the donor.*

- *However where NFPs will report to ACNC then a statement regarding funds received, aims of organisation and use of those funds should be required of the responsible individual. That statement should form part of the compulsory annual returns delivered by organisations.*
- *The executive/board/responsible individuals would need to assume the responsible oversight of the organisation.*

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

- *An education process is needed similar to what the stock exchange has previously run for company directors and secretaries. This programme could be compulsory or voluntary, and cover a reasonable range of issues for NFP responsible persons and other executive members. The most important thing would be availability of the course to persons across regions as well as capital cities*

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

- *This seems a commercial decision driven by the normal operation of any organisation. To legislate seems excessive and could lead to problems of whether an insurer would accept the risk of a particular activity or operated by a particular group. The mandate would then fail.*

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

- *See above, but most groups hold directors' and officers' insurance and a similar product would be available and used. Other usual insurance should be taken out but the insurer would be the decision maker on whether it was prepared to grant the cover, so mandating such cover would not be acceptable.*

20. What internal review procedures should be mandated?

- *Mandatory process at internal level: all organisations should have financial reports prepared and tabled at their AGM as well as being delivered to the government governing body (eg, currently in Qld the Office of Fair Trading ).*
- *The Board should be required to approve the financial report and declare that the report matters are within the aim of the organisation.*
- *The preparation of the report and the declaration can be by internal officers or management but that is then tabled and should be read by the Board.*
- *An external check comes with the lodging of the report at government department level.*

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

- *These should be those that govern purpose/aim, and internal reporting and declaring [see 20 above]. The requirements should include the usual points on dissolution of no distribution except to similar aimed body.*

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?

- *The ACNC should have an active role in the governing rules particularly those that protect the mission and the public interest. This is what such a centralised system should be for, to set out and review requirements. However for existing rules and NFPs the situation is more complex( see 23 and 24 below)*

23. Who should be able to enforce the rules?

- *Rules should be enforced by the members and then ACNC including court orders if necessary.*
- *This creates a difficulty because a member feeling discriminated against may be entitled to bring an application in court to protect his/her rights or compel the duty of the Board; this step needs to be first taken to ACNC and then if unsatisfied the member should still retain rights to apply to court*

24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind up or deregistration?
- *There is no simple answer to such a wide ranging and powerful issue.*
  - *Such a role means the ACNC goes from a formulaic centralising body to an enforcement body. The conflict of ACNC versus member powers and rights becomes an issue. Look at the position in [23] above.*
  - *The task of ACNC to guide and then to regulate raises a query of what power is used; a mandatory correction of a problem or simply deregistration as a charity*
  - *I do not believe the ACNC should have roles in enforcement if it also sets standards required (and enforceable by members or courts/tribunals)*
25. Should model rules be used?
- *Model rules should not be used or, if proposed, should contain an opt out right for all or part of same. Not all organisations will find standard rules suitable for their purposes. Some formal model rules for instance still require payments to be made by cheques signed by the Chairman and one other. Almost all organisations use internet banking these days.*
26. What governance rules should be mandated relating to an entity's relationship with its members?
- *Members should have rights to attend meetings, call meetings in certain circumstances, vote at meetings and be appointed to positions.*
27. Do any of the requirements for relationships with members need to apply to non-membership based entities?
- *Some requirements such as calling for general meeting and voting and taking a board /office bearer position are necessary even if it is a non member entity( but has board membership)*
28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?

- *Yes it is appropriate as otherwise there is the risk of decisions being made without communication, and so no transparency*
29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?
- *Where the organisation is solely government funded there should be a right to impose further governance and reporting issues.*
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?
- *You can't because some NFPs will have not complied with any guidelines anyhow. They will have an increase in red-tape. Otherwise, the ACNC must consider the early steps will require red tape anyhow as a uniform system is developed. That system once fully employed will replace the older red-tape, and so even out in the end.*
31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC ?
- *Firstly , in guidance material a guide to structure, board obligations and to reporting conditions. Then general business technique to avoid "mission drift".*
  - *Legislation requires the basic levels of type of structure and how created, obligations and how enforced, and the registration issues.*
32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?
- *The two points above and then the possibility of further explanation about conflict issues which may occur due to intra-family groups in any tribal or land based connotation.*
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?
- *The major recommendation required to be worked out will be informing all organisations of what is required and how and when. Many of these organisations are not run by or use the skills of professional advisors. The availability and ease of adopting new procedures will be essential if reform is to be effected simply.*