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Manager  
Philanthropy & Exemptions Unit  
Personal and Retirement & Income Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**Consultation Paper — Review of not-for-profit governance arrangements**

The Australian Breastfeeding Association is pleased to have the opportunity to comment on the Consultation Paper. As a small national not-for-profit company limited by guarantee, our Association welcomes initiatives to assist with effective governance and ensure our members and the broader public we serve are protected.

In this submission, we provide an overview of our organisation to provide contextual information for our comments. We are an example of a NFP organisation which provides a community service, relies heavily on the volunteer workforce. The Association is funded by membership fees, sponsorship and a small amount of government funding. Our organisation has been sustained over a 47-year period, in part due to the focus on developing and reviewing our governance arrangements and documentation.

The Australian Breastfeeding Association would welcome the opportunity to access guidance, training and resources tailored to the NFP sector. These would be more relevant to our organisation than the current for-profit corporate governance regulations and tools. This would also simplify our interaction with government regulatory and funding arrangements.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rachel Fuller".

Rachel Fuller  
National President  
Australian Breastfeeding Association

## Background

The Australian Breastfeeding Association (the Association or ABA) is a national not-for-profit organisation governed by a Board made up of seven elected and up to three appointed directors. It is constituted as a company limited by guarantee, and is a membership-based organisation with over 14,000 current members. Since its establishment, the Association has served over 220,000 members and their families and provided counselling, information and education to the general public over a 47-year history.

The Association was founded as the Nursing Mothers' Association in 1964 and changed its name to the Australian Breastfeeding Association in 2001. The Association is a Registered Training Organisation (RTO), providing three certificate IV courses offered to volunteers, with a diploma course under development for health professionals.

The Association primarily operates through volunteers, supported by a national office based in Melbourne, with branch offices in four states and the ACT which receive financial support from state governments. An Executive Officer (EO) reports to the Board and is responsible for managing ABA's Head Office function, trading company (Mothers Direct) and a number of ABA services and programs. There are approximately 35 company employees in different locations across Australia (Brisbane, rural Queensland, Adelaide, Canberra, Central Coast NSW, Broken Hill) who report to the Executive Officer.

ABA has over 900 volunteer counsellors and over 200 volunteer community educators who provide the majority of ABA services and also hold management and coordinating positions at national and state levels.

Each state/territory has a nominated 'Branch' managed and administered through a branch committee structure, led by a Branch President. Branch Presidents are responsible for the volunteers in their respective state/territory. Most branches also have a branch office, some of which have paid staff that report to the Branch President. The Branch Presidents report to the ABA Board of Directors.

ABA's major services include:

- ❑ National Breastfeeding Helpline — this is a free 24-hour a day/7 days a week service, provided by ABA's trained volunteers. It receives approximately 7000 calls per month
- ❑ Email counselling for breastfeeding questions
- ❑ ABA groups — approximately 252 support groups that meet across Australia, usually fortnightly
- ❑ Online forums where general discussions are held and questions answered
- ❑ Lactation Resource Centre (LRC) — collates research and provides information, continuing education and resources for health professionals in the lactation sector. LRC has 900 subscribers at various levels, predominantly institutions and individuals.
- ❑ Training — in addition to the continuing education delivered through the LRC, ABA is a Registered Training Organisation (RTO), currently delivering three nationally-recognised training courses to its volunteers:
  - *Certificate IV in Training and Assessment*
  - *Certificate IV in Breastfeeding Education (Counselling)*

- *Certificate IV in Breastfeeding Education (Community Education)*
  - *Certificate in Community Breastfeeding Mentoring* that is targeted at community members who support breastfeeding mothers including Aboriginal peer support workers
  - newly accredited *Diploma in Breastfeeding Management* which will be delivered to external health professionals.
- A Breastfeeding Centre in Victoria and a Breastfeeding Lounge in NSW where mothers can receive face-to-face help with breastfeeding
  - Breastfeeding Friendly Workplaces Program — this program accredits workplaces that meet criteria around policies, practices and facilities that support women to breastfeed or express breastmilk when they return to paid work
  - Breastfeeding Education Classes and participation in community events
  - Mothers Direct (MD) — is a separate retail company, wholly owned by ABA, which sells a range of breastfeeding-related products. MD has shops in Melbourne and Brisbane as well as Internet and telephone sales.

ABA's major income sources include membership subscriptions, Federal funding through the Department of Health and Ageing to support the training program and Breastfeeding Helpline; state Government funding generally through the respective health departments in Queensland, New South Wales, Victoria, Australian Capital Territory and South Australia to support functioning of branch offices and state-specific programs, sponsorship and fundraising, product sales through the retail division.

The Association's Annual Report provides details of the company's financial status. Core corporate documents include a Constitution, Code of Ethics, Annual Reports, Strategic Directions, Complaints Policy and Privacy Policy which are all published on the Association's website and accessible to the general public.

## Response to Consultation

### Introductory Comments:

The not-for-profit sector Page: 4

needs consistent, standardised and thorough training and resources available to the organisations and to individuals joining as a director. At present, it is up to the individual/entity to rely on its own resources and knowledge. Some have the resources and networks to engage lawyers and HR specialist, but most don't.

Resources would include a series of checklists and templates that could be used by NFPs to develop, for example, a risk management matrix, or a business recovery plan. This would mean that individual entities are not left to their own devices to develop these documents or alternatively, to be left vulnerable if they don't. This sort of approach could be applied across the whole of a NFP entity, so that eventually there would be a set of documents a NFP could access to ensure risk was minimised and what they had implemented was best practice.

This approach would extend to the board, as well as the operations of the NFP — ie people who join a board should be required to undertake a minimum training/orientation, not provided by the NFP but by a central agency. There should also be a minimum set of documents a board should have eg a constitution, a board charter, position descriptions, a set of policies including conflict of interest.

A central agency needs to develop these resources and training in collaboration with the NFP sector — the benefit for the Government being consistency among the NFP they auspice as well as provision of tools to assist NFPs to meet standards underpinned by governance principles, rather than a focus on regulatory control.

Services provided by this central agency could also include a central HR advice line, IT/database advice, legal advice. These are all areas that can be complex and high cost for a NFP and can leave them vulnerable if not addressed, or addressed properly.

## Specific Feedback on Consultation Questions

### 6.1 Responsible individuals' duties

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?**

The Association agrees with clarifying these points in the 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?**

Responsible individuals of NFPs need to consider all these parties. The Australian Breastfeeding Association considers its responsibilities to its 14,000 members, 1130 trained volunteers providing counselling and community education, Commonwealth Government and State Governments in its engagement in advisory committees and through funding arrangements, donors and corporate sponsors, as well as the public at large in the provision of high quality evidence-based breastfeeding support and information.

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

Similar to those outlined in the paper, acting with care and diligence, including:

- oversight that an entity is operating in the best interests of those affected by its operations
- help to keep the entity operations focussed on its mission, and operating for its cause, and not the interests of the responsible individuals
- avoid any personal conflict of interest or real possibility of conflict of interest
- a duty to ensure the company maintains its not-for-profit principles and status
- a duty to act in good faith in the best interests of the entity
- a duty to not misuse their position
- a duty to not misuse information
- a duty to disclose material personal interests
- support a governance requirement for an effective board, providing good governance and leadership, exercising effective control, behaving with integrity, openness, transparency and accountability.

It is unclear how, under a principles-based approach, the standard of care and diligence expected of the particular individual would be determined 'in being dependent 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' (point 102:p18).

**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 in a not-for-profit charitable organisation should be no higher for paid employees than volunteers, professionals than lay persons, in that the organisation is accountable to a broader constituency than a for-profit organisation. The standard of care may be higher where specific qualifications are held, eg in accountancy, although as a minimum, all responsible persons should make it their business to gain adequate knowledge to fulfil their responsibilities such as making informed financial decisions with public, members' and donated moneys.

**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)?**

The size and amount of funding administered by a NFP may be considered a factor. However, the nature of NFP organisations often being founded on public donations or memberships carries expectations of accountability and stewardship of resources regardless of the size of the organisation.

Qualifications in finance, law or governance may be an advantage, but not a necessity; the skill set and skill mix of the leadership group of responsible individuals is more consequential. The requirement to hold a qualification or have particular experience would run counter to the culture of volunteerism. It would significantly decrease the pool from which volunteers come and potentially create a culture of elitism. Instead, appropriate training and resourcing of those who join a NFP could address the knowledge requirements.

Further to this, having adequate systems and processes in place and annual auditing and review is a fundamental requirement.

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

No, to all responsible individuals within the registered entity.

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

A principle based approach is more conducive to the variance and diversity of NFP structures and functions, rather than a prescriptive set of standardised 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?**

The Australian Breastfeeding Association has, since its inception, had a Code of Ethics and a Memorandum and Articles of Association (now Constitution) covering volunteers. The Association believes that its approach has contributed to the longevity and sustained quality of information provided by its volunteers over a 47-year period.

The Code of Ethics covers ethical conduct both within the Association and towards its key public constituents (such as health care workers) and the general public.

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

No — all NFPs should apply a high standard of care and good governance principles. This would be assisted by the provision of templates, checklists and other resources from a central agency such as ACNC.

**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 Australian Breastfeeding Association seeks governance principles which are tailored to the specific structures and requirements of NFPs. These may be linked to the Corporations Act; however, they must distinguish from the requirements of ASX companies where profit to shareholders is the overarching aim.

## 6.2.1 Conflict of interest

Consultation questions

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

The Australian Breastfeeding Association has a Constitution; Code of Ethics; Strategic Plans; Annual report and a documented organisational structure. These are made publicly available on the website.

The Association believes that this information should be required to be disclosed to ensure good governance procedures are in place.

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

Many NFP organisations, Australian Breastfeeding Association included, have arrangements to reimburse expenses to directors and volunteers managers but do not provide direct payments to them.

Disclosure of direct payments to directors should be required.

The Association suggests that disclosure of the chief executive/executive officer's salary and any bonuses be made once these meet and exceed a standard rate determined by the central agency (eg ACNC), for example \$120,000 before tax.

This disclosure would ensure that NFPs which are predominantly funded by public funds are accountable for the use of these funds, within reasonable parameters.

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

These are appropriate.

### **14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?**

This may be necessary.

### **15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?**

Material personal interest should be sufficient.

## 6.3 Risk management

Consultation questions

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

No additional requirements; however, there is need for a set of specific NFP governance principles to inform risk management and which includes openness, reporting to the public, minimising excess administrative costs, etc.

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A pivotal point that underpins this, is that whatever the requirements are, there needs to be training and supporting documents/templates to assist NFPs to meet those requirements in a consistent and high quality way. At present, many NFPs do not have the knowledge (ie they 'don't know what they don't know') or the resources to meet those requirements. It can be daunting and difficult to know where to begin, leaving the organisation open to risk.

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

ABA's preference is that broad requirements are mandated to ensure that adequate procedures are in place, and assets protected. Particular requirements may not be relevant to the range and size of NFP — eg many NFPs have insufficient funds to even consider an investment strategy.

### **18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstance**

All NFPs should have Public Liability as a minimum and they may well have that already in order to fulfil their lease requirements — should they have a lease agreement in place.

The other type of insurance that may be of benefit to the wider community is Personal Accident cover. The Australian Breastfeeding Association has this for our volunteers. It is not compulsory, but a benefit in volunteering for our Association is that people are then covered if they are injured whilst working for us as volunteers. Volunteers are not covered by WorkCover.

It is highly recommended that the ACNC look into a government based insurance policy to provide these types of insurance rather than NFPs having to compete on the open market. Insurance is often a real financial burden for NFPs — particularly the small ones.

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

The organisations should have Directors and Officers Insurance or Management Liability which covers the management committee or board plus the officers of the company like the executive officer and finance officer.

The other type of insurance that would help protect the company or association from the actions of a board is Employment Practice Liability, for example in the event of a wrongful dismissal charge.

### 6.3.1 Internal and external reviews

#### Consultation questions

Internal and external reviews are necessary and accepted component of good governance. However, the cost of auditing is high and is a substantial burden for a NFP, particularly smaller NFPs.

The approach in having a minimum set of documents, procedures, templates and checklist for all NFPs to access would assist in minimising the costs and improving management of risk.

#### **20. What internal review procedures should be mandated?**

Reporting to members, regardless of a formal audit; annual report; financial reports; report on activity.

## 6.4 Minimum requirements for an entity's governing rules

Consultation questions

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

The Australian Breastfeeding Association's Constitution contains the following which we see as being a minimum requirement for any NFP.

**Accounting records** — True accounts must be kept of the sums of money received and expended by the NFP and the manner in respect of which such receipt and expenditure takes place and the property, credits, and liabilities of the NFP.

Proper accounts to be kept with respect to:

- (a) all sums of money received and expended by the NFP and the manner in respect of which the receipt and expenditure takes place;
- (b) all sales and purchases of goods by the NFP; and
- (c) the assets and liabilities of the NFP.

All cheques and other negotiable instruments drawn on the NFP's bank account must be signed, drawn, accepted, endorsed or otherwise executed.

**Location** — The accounting records of the NFP shall be kept at the Office or at such other place or places as the Board thinks fit, and shall always be open to the inspection of the Board.

**Inspection by Members** — Subject to any reasonable restrictions the accounting records of the NFP should be open to the inspection of Members.

**Audit** — Once at least every year the accounts of the NFP should be examined by one or more properly qualified auditor or auditors. The NFP shall observe the provisions of the Corporations Act in relation to the appointment of an auditor or auditors.

**Minutes** — are duly recorded.

- (a) of the names of everyone present at each meeting of the Board and of any Committees;
- (b) of all appointments of officers of the NFP
- (c) of all by-laws and regulations made which shall be kept in a separate book called 'By-laws and Regulations of the Association';
- (d) of all resolutions and proceedings of general meetings of the Association and of meetings of the Board and any Committees,

and the minutes of any meeting of the Board or of any Committee or of the Association, if purporting to be signed by the Chairperson of the meeting or by the Chairperson of the next succeeding meeting, are prima facie evidence of the matters stated in the minutes.

**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?**

Minimal mandatory requirements, with broader guidelines which are principles-based and adaptable to the specific structure and mission of the NFP. Any mandatory requirements should be developed in consultation with a range of NFPs within the sector, and take into account the varying structures and size of the NFPs.

**23. Who should be able to enforce the rules?**

This is already suggested within the charter of the ACNC as their responsibility. However, there is a greater need for guidance, education, resources and support without which the NFP sector will have difficulty complying with enforced rules.

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

This is already suggested within the scope of the ACNC charter.

**25. Should model rules be used?**

Model rules could be provided in a template for NFP constitutions. As previously indicated, ABA would welcome a set of templates and guidelines for the sector. There would need to be provision for organisations to tailor the constitution to their own specific characteristics.

It is unclear from this question if the ACNC is proposing to have to approve a constitution before it is adopted by the membership — if this is so, does the ACNC have the capacity to do this?

## 6.5 Relationships with members

Consultation questions

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

All NFPs should, as a minimum, provide members with an annual report giving details of both the financial position of the NFP and its activities. This would be presented as part of the annual general meeting procedure.

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

ABA has no comment on this.

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

Yes as stated above, the minimum requirement should be to hold an annual general meeting, which is publicised to all members. In addition, provision for an extraordinary general meeting to be called should the need arise between annual general meetings.

In addition, ABA would advocate minimum meeting requirements for the board of directors or managing boards of a NFP.

The Australian Breastfeeding Association requires the Board to meet together at least four times a year and defines the meeting structures and minimum procedures within the Constitution.

The requirements may vary from NFP to NFP but generally speaking there should be at least one meeting a year where the members are invited to ask questions of the people leading and managing the NFP and have an opportunity for responses.

## 6.5 Summary

Consultation questions

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

No comment on specific types. All NFPs would benefit from additional support as indicated in ABA's introductory comments. A central agency to develop resources and training in collaboration with the NFP sector; basic foundational training for directors and executive officers; provision of tools to assist NFPs to meet standards underpinned by governance principles; services such as a central HR advice line, IT/database advice, legal advice.

### **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?**

Reduce the need for duplication of information between government departments; standardise forms across government departments for funding submissions and reporting templates.

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

No comment within the timeframe of this submission.

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

ABA has no view on the governance of Indigenous NFP entities.

### **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?**

No further comment within the timeframe of this submission.