

27 January, 2012

NFPreform@treasury.gov.au

ACWA Response to the Review of not-for-profit governance arrangements and the Exposure draft of the ACNC Bill

The Australian Community Workers Association (ACWA) is pleased to respond to Treasury's *Review of not-for-profit governance arrangements* and the exposure draft of *Australian Charities and Not-for-profits Commission Bill 2012*. ACWA congratulates the Australian Government in establishing an independent regulator for the not-for-profit sector and in particular the concept of a one-stop shop. However, in line with ACOSS and the many organisations it represents, we are concerned at the breadth of responses that will be received given the speed and timing of the Treasury's consultation process occurring across the traditional holiday season.

We endorse the submission from ACOSS which raises many of the broader concerns of the sector and consequently have confined our own comments to those areas of the consultations that impact most on the working conditions of community workers employed by not-for-profit organisations.

ACWA also shares a concern at the timing of the release of the exposure draft of the ACNC Bill believing it would have been more appropriate to deal first with governance as we assume that the concurrent consultation will have some impact on the proposed legislation. A secondary concern, which we hope will be addressed in the next iteration of the Bill, is the assumptions about the sector embedded in the legislation. For example, not all nonprofits have donors, and where others receive favourable tax treatment, they are not unaccountable; already accounting to the Australian Taxation Office.

Background to Australian Community Workers Association

Founded in 1969 and formerly known as the Australian Institute of Welfare and Community Workers Inc., the Australian Community Workers Association Inc. (ACWA) is the professional association for all paid and unpaid human services workers in Australia regardless of their occupational title or level of educational background.



ACWA has three main functions:

1. Membership and continuing professional education for human service practitioners, students and volunteers.
2. Approval of community services related courses across Australia.
3. Gazetted assessing authority for people desirous of migrating to Australia under the occupation of welfare worker.

ACWA's role is threefold:

- To advance the profession of community worker and its various occupational groupings.
- To represent the professional interests of community workers employed within non-government social welfare agencies, government departments, private practice, self-help groups, and social and commercial industrial enterprises.
- To act in the public interest.

Membership of ACWA is predicated on the holding of an approved qualification and/or achievement of five core competencies based on current and past experience. Members of ACWA work to a Code of Ethics and are held in high regard in the sector. One aspect of ACWA's role among many is to define and encourage a high standard of qualification and continued professional development for community workers; an aspiration that is often thwarted as qualified and experienced staff move out of the sector and find work in other industries. (CSHISC 2011:13)

ACWA holds the view that not-for-profit organisations function most successfully and retain staff when boards or committees of management are skilled and understand their governance roles, responsibilities and demarcation from management. ACWA also recognises that the community has clear expectations of not-for-profits that receive public donations, government grants or favourable tax treatment. From ACWA's perspective organisations that employ staff to provide community services have an additional and important responsibility to govern fairly and well.

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

Each state or territory has legislation that governs the set up and oversight of not-for-profit entities and each piece of legislation differs marginally from the next. Given that not-for-profits benefit from such things as input tax concessions (notably the FBT with a tax expenditure value of over \$1 billion and payroll tax benefit estimated to be at least \$766 million in 2008-09 (Productivity



Commission: 2010: XXXI) and receive donations from 4.6 million Australians each year, it is clearly in the sectors' best interests to retain the trust and confidence of the public and government.

ACWA believes that a clear piece of legislation that articulates the principles of a well governed and managed organisation that is transparent and accountable will engender the support that a large proportion of the sector needs to undertake its work. In keeping the legislation simple and clear, and taking into account the diversity of the sector, we believe that within the Bill the duty of responsible individuals is to the not-for-profit entity itself.

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?

As most not-for-profits are set up for a social purpose by individuals who have identified a cause or issue which needs attention, we believe it follows that all organisational stakeholders and the organisations' mission should be considered by the responsible individuals. We do not however, see the value or feasibility of legislating for these duties other than the duty to the entity as mentioned previously.

ACWA supports transparent reporting to donors and the public (both interested parties who have either directly or indirectly provided financial support to the entity) but believes that this will be dealt with under other legislation or regulation.

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

As the exposure draft of the ACNC Bill identifies a number of categories of 'responsible individuals' it is seen as appropriate that some general duties are outlined in the legislation. ACWA supports the general duties of responsible individuals outlined in paragraph 91 of the consultation paper and which are in the main covered by other regulatory legislation. (Australian Government: 2008: 10).

ACWA supports the suggestion that guidance and support material should be readily available on the ACNC web site and that this material should be available in a range of media accessible to people with disabilities, people from non-English speaking backgrounds, those with limited educational qualifications, those who are time poor and those who may begin with a limited understanding of their roles and responsibilities as governing agents.



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?

A distinction should not be drawn between paid and unpaid persons acting as responsible individuals. It is the performance of the duties rather than the employment status of those undertaking them that is essential for the viability of the organisation. It is further assumed that any professional person acting as a responsible individual in a professional capacity will be bound by the standards of that profession. Most not-for-profits are governed by unpaid persons with employees having management roles. Due to a range of professional and personal liability and employment vulnerability reasons, it should not be the responsibility of an employee to assure the skills or knowledge of her/his governing body.

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)?

ACWA believes that board members should, as far as possible, be recruited for the skills they can bring to the organisation. However it appears to be overly prescriptive and unfeasible to require boards to have set qualifications.

ACWA supports the notion of boards working to a prescribed set of governance principles (similar to the requirements of the ASX Corporate Governance Principles for example) and to have access to free and universal 'not-for-profit specific' board training to ensure that both individually and collectively, boards understand their role and responsibilities. Our members, like other paid workers in the sector, cannot perform their duties efficiently and well if the governance structures within the organisation are unclear or the board is unskilled. Fortunately many of our members work in organisations where the board understands its governance vs management role. However, according to our survey, others work in organisations where the board engages in direct management 'which was very poor, because they did not know the issues or want to know'. (ACWA: 2012)

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

Creating a suite of core roles as part of position descriptions for board members may be seen as helpful for small to medium not-for-profits. These roles could then be tailored by organisations to create a position description for each board member to assure role clarity and sense of purpose.



Feedback from ACWA membership confirms that not-for profit organisations vary enormously in size and capacity. Consequently, we support proportionality as the overarching principle when reporting frameworks are developed.

Survey responses from our members suggest that receipt of government funding in particular creates an extra layer of rules and reporting that stymies creativity and responsiveness in the part of the sector that provides community services. We support the notion that reporting is eventually restricted to one entity and that government governance requirements are harmonised with ACNC governance principles. To minimise financial reporting we also support the suggestion that acquittal reporting is confined to outcomes and/or impacts. The priorities ‘Reduce red tape and streamline reporting’ and ‘Simplify and improve consistency of financial arrangements including across state and federal jurisdictions’ and ‘Improve funding and procurement’ outlined in *The National Compact* (Australian Government: 2011: 3) should be referenced by the ACNC when developing requirements of the sector.

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?

As previously mentioned, ACWA does not regard the distinction between paid and unpaid persons to be germane to the execution of duties of responsible individuals. Conversely, an organisation does have an obligation to ensure that volunteers are not disadvantaged by their volunteer status: for example, they should be sufficiently covered by insurance and reimbursed for out of pocket expenses.

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

Organisation objects/purpose, governance structure and related processes, board membership and criteria for office bearers, board responsibilities, organisation membership criteria, responsibilities and subscriptions, procedures for altering rules, holding meetings and addressing grievance and disciplinary matters, organisational compliance with legislation are all requirements that are included in the various pieces of legislation governing associations and companies limited by guarantee. As there are several types of not-for-profits to be included in the Bill, it seems preferable that rather than trying to identify core elements common to all this should be dealt with through guidance material.



ACWA believes that in time it would be beneficial for the sector to have access to a set of national model rules which incorporate minimum requirements providing it is clear to which regulatory authority they apply and for which entities they are applicable.

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?

Our suggestions include:

- Gain agreement and support from all state and territory regulating and funding bodies that the primary regulating body will be the ACNC;
- Ensure that organisations are not reporting to multiple regulators;
- Work to the principle of proportionality;
- Develop a reporting framework that simplifies compliance, for example, a signed report as follows:- the board has:
 - conducted an Annual General Meeting
 - produced an Annual Report (proportional to size of organisation)
 - complied with the requirements of its governing rules/constitution/trust deed etc.
 - audited the organisation's accounts in accordance with a relevant standard
 - complied with relevant legislation (particularly workplace legislation for staffed not-for-profits).
- ACNC as advocate for single service agreements for organisations with funding from multiple sources within the one government entity.

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

Our view is that the legislation should be as clear and simple as possible. We therefore subscribe to the idea that governance principles, duties and considerations should be dealt with through guidance and support materials.

Although there is an abundance of governance principles which have broad congruence, the principles endorsed by the Charity Commission (UK) are clear and relate well to the not-for-profit situation. Most importantly, we believe they can be adapted to the size of the organisation. Our view is that the following (slightly reworded) principles cover all aspects of governance responsibility in the sector and are principles that we would be happy to promote.



An effective board will:

- Understand its role and legal obligations and the roles and responsibilities of each office bearer
- Lay solid foundations for management and oversight of the organisation
- Make ethical and responsible decisions
- Report to its stakeholders in an accountable and transparent manner
- Ensure the organisation has a plan to achieve its purpose
- Recruit for effective leadership, regularly assess its own performance and plan for a seamless succession
- Ensure the organisation has adequate resources to achieve its purposes
- Recognise and manage risk

We also believe that a range of guidance and educational materials under each of these broad principles will assist boards in the understanding and execution of their duties.

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

As a professional association, we are concerned with the impact NFP reform will have on the working conditions of our members. We are equally concerned with the existing working conditions of both members and non-members. Skilled board members with a clear understanding of governance generally ensure that an organisation is well managed, resourced adequately and managing its risk. For organisations that provide services to the community and employ staff, we are particularly concerned to ensure that a board is conversant with all aspects of its role, understands the purpose of the organisation and is able to hold staff to account without sacrificing their job satisfaction.

As many organisations employ highly skilled, qualified and specialist staff who are required to work to a professional standard, they need the comfort of knowing that boards are also working to a standard. 'Changes in policy have an effect on the ability to maintain professional standards when one has to tell clients the goalposts have changed' (ACWA: 2012)

Most not-for-profits have competent boards, but others struggle with board members who have no real understanding of their role. When a board is unsure of its role or what it should be doing then there is a risk of creating a negative relationship with paid staff - 'The way it was run had a negative effect on most staff' (ACWA: 2012).

Research undertaken by the Association Management Institute suggests that "72 per cent of associations are at risk of a corporate governance breach; 63 per cent of associations do not have a corporate governance policy or adequate checks and balances to avoid a financial disaster; and 59



per cent of executive directors cannot identify their roles and responsibilities in terms of corporate governance and/or their legal and compliance.”

It is clear that boards, even the most competent, need access to not-for-profit specific board training and to resources. Board training is an overall sector strengthening activity as, particularly in regional and rural areas, one person often sits on more than one board. ACWA believes that there is a genuine role for the Commission to assist not-for-profits well beyond the scope of regulation.

To ensure a successful transition for nonprofits and for the Australian Government to realise its vision for an accountable and transparent sector, ongoing ACNC support through such activities as local, accessible, free and/or highly subsidised training and resources must be offered to governance boards.

ACWA welcomes the opportunity to contribute to this consultation and looks forward to future involvement with the establishment of the ACNC.

Yours sincerely

Lynda Ford
Chief Executive Officer

References

Community Services and Health Industry Skills Council, 2011, *Environmental Scan 2011*.

Office of the Registrar of Aboriginal and Torres Strait Islander Corporation, *Comparative table of Commonwealth, state and territory incorporation legislation*. Australian Government 2008

Australian Community Workers Association (unpublished) *Survey*, ACWA January 2012

Australian Government *National Compact Working Together Commonwealth of Australia 2011*

Productivity Commission, January 2010, *Contribution of the not-for-profit sector*, Productivity Commission Report, Commonwealth of Australia 2010.