

# Review of not-for-profit governance arrangements – Cancer Council Australia response to consultation paper

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Responsibility for the content of this submission is taken by Professor Ian Olver, AM, Chief Executive Officer, Cancer Council Australia. This submission is on behalf of all Cancer Council Australia member organisations, which have an equally high stake in a robust NFP sector, and incorporates their recommendations.

Contact for further information: Paul Grogan, c/o [paul.grogan@cancer.org.au](mailto:paul.grogan@cancer.org.au) or (02) 8063 4155.

## Overview

Cancer Council Australia welcomes the opportunity to comment on the Australian Government's consultation paper reviewing governance arrangement for the not-for-profit sector. As the largest federated health charity in Australia, with a 50-year history, Cancer Council Australia has a high stake in the development of a robust not-for-profit sector in Australia, underpinned by good governance.

"Appropriate" (legally compliant) governance is bound by a range of established legal/regulatory instruments; "good" governance – where an organisation actively seeks to engage in best practice for the benefit of its stakeholders and the wider community – should be a matter for individual organisations to manage.

Cancer Council Australia supports in-principle the Australian Government's intention to strengthen and improve the coordination of compliance arrangements for appropriate governance. We also support moves to encourage good governance across the not-for-profit sector. Such measures have the potential to improve the effectiveness of the sector, for the benefit of the broader community.

However, enhancing governance *per se* is a complex and multilayered issue. There is significant risk that, due to the nature of Australia's federation and the arduous and labyrinthine compliance and reporting requirements already in place, a legislative approach to enhancing governance could disadvantage both the sector and the community.

As Cancer Council Australia has stated throughout its responses to government consultations on not-for-profit sector reform, the keys to an improved sector include:

- reducing administrative burden, including direct financial costs, to organisations, thus ensuring more donor funds and other resources are allocated to achieving an organisation's mission;
- greater transparency, to provide potential donors with more information about the charities they choose to support; and
- safeguarding concessions such as tax deductibility status, without which not-for-profit organisations would become unviable, at great loss to the community.

Enhancing governance arrangements for the sector would not in our view achieve these goals if it is sought by applying another layer of law and administrative burden, enforced by the Australian Charities and Not-for-profits Commission (ACNC) and possibly out-of-step with current arrangements.

At the outset, the ACNC's focus could be on not-for-profit entities whose legal structures are not already regulated by existing legislation.

The ACNC does in our view have significant scope to assist in the development and promotion of improved governance. However, in most cases this will need to be *encouraged*, rather than mandated, until such time as uniform laws exist across jurisdictions and are applied and supported by the multiple government agencies involved in monitoring and enforcing current arrangements. This would take lengthy negotiations and gradual reform.

We therefore provide responses below to the consultation paper's 33 specific questions in the context of these caveats.

## **About Cancer Council Australia**

Cancer Council Australia's goal is to prevent cancer and reduce the burden of illness, disability and death caused by cancer. Cancer Council Australia seeks to achieve this largely by the development and promotion of effective evidence-based cancer control policy and programs in Australia.

Cancer Council Australia acts nationally on behalf of its member organisations, the eight state and territory Cancer Councils, to advise the Australian Government and other bodies on practices and policies to help prevent, detect and treat cancer. Cancer Council Australia also advocates for the rights of cancer patients to best treatment and supportive care.

The eight state and territory Cancer Councils work independently and together, through Cancer Council Australia, to undertake and fund cancer research, prevent and control cancer (through effective policy, programs and education campaigns), and provide information and support for people affected by cancer. Thanks to community support, the Cancer Councils are both the leading non-government funders of cancer research in Australia and provide a comprehensive range of community support services for people affected by cancer.

All eight state and territory Cancer Councils are separate entities established under a variety of governance arrangements, but all are non-government, not-for-profit organisations with a shared stake in a robust charity sector in Australia. While the Cancer Councils openly compete for cancer-related government contracts, our operational funds are derived entirely from non-government sources.

## **Responses to consultation paper 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?**

No, not specifically. It would be difficult and also unnecessary to specify in a legislative instrument "who" should be considered by responsible individuals in the not-for-profit sector when exercising their duties.

All responsible individuals representing a not-for-profit entity – whether salaried staff, directors, chairpersons, other committee members or office bearers – have a responsibility to the entity, the community and all individuals in the execution of their duties.

There is adequate protection in the existing legal framework, without requiring further legal clarification on who requires “consideration” in this context. Entities could be encouraged to have codes of conduct to help guide all representatives in exercising their duties appropriately, but seeking to address this issue through law reform is unfeasible.

## **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?**

Again, not-for-profit organisations – like any organised entities – have responsibilities to execute their duties in accordance with a range of laws established to protect the rights of *all* members of the community, collectively and as individuals.

Seeking to specify which population groups require special “consideration” is problematic.

Unlike *for profit* organisations that have specific responsibilities to owners/shareholders, not for profit organisations are responsible to specific groups in different ways, yet at the same time have a responsibility to a broad range of stakeholders – e.g. donors should be assured their funds are allocated according to an organisation’s mission/charter, with expenditures appropriately reported. Organisations’ works should assist “beneficiaries”, however these can be specific groups (e.g. cancer patients) as well as the general public (e.g. communities benefiting from preventive health programs). Seeking to specify who these groups and individuals are is complex and unnecessary.

The goal of reviewed governance arrangements should be greater uniformity and streamlining across the sector, increasing transparency, facilitating compliance and reducing administrative burden.

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

The duties of responsible individuals in the ACNC legislation should reflect the duties of company officers as articulated in the *Corporations Act 2001* and also as set out in point 91 of the consultation paper:

- a duty of care and diligence;
- 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; and
- a duty to disclose material personal interests.

Seeking greater rigour than is already provided in the descriptions above would be unfeasible and likely to increase administrative burden.

## **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?**

Legislating for varying standards of care that would apply to a diverse range of individuals according to seniority, skills and the nature of their engagement with an organisation would be unfeasible. Articulating such “standards” in a practically applicable way would also be unfeasible.

Adequate laws underpinning standards of care in all professional settings already exist. Attempting to stratify standards for the not-for-profit sector would be unwieldy and unworkable, particularly if this approach included standards based on an individual’s role in the organisation. (For example, do revised governance arrangements for the sector need to specify a particular response for dealing with a senior accountant who deliberately misappropriates substantial donor funds, compared with a volunteer who slips a \$10 cash donation in their pocket? We would say no, not when existing laws, used appropriately, already apply.)

Not-for-profit organisations with employees and volunteer services should already be aware of their requirements, and advise staff accordingly.

**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)?**

Not specifically, and only when mandated by other laws and regulations (professionals employed in fields where formal qualifications are essential to job description – e.g. clinical, legal, financial).

It should be a given that not-for-profit organisations employ and/or engage appropriately qualified individuals in their respective roles. However, specifying such qualifications in law or regulation would be complex and unwieldy. For example, for a role where experience, rather than a stringent professional/tertiary qualification, is seen as the key to an employee’s suitability, how is this quantified? Years of service in a similar role? Referee reports? This is unfeasible and inappropriate to mandate.

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

See response to question 4.

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

The key issue is that standardising duties in this way would be unfeasible and unworkable. Adequate laws, regulation and scope for organisational codes of conduct exist to underpin appropriate execution of responsibility and duty.

A key objective of the not-for-profit reform agenda should be reducing administrative burden, while providing greater transparency and ease of compliance. Attempting to standardise duties (and in a broader context, organisational structure) as proposed would be likely to increase red tape without any apparent benefit to the sector or the wider community.

The prescriptive nature of such a proposal would immediately hinder organisational flexibility and potentially increase costs.

**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?**

Not within the ACNC.

In a number of not-for-profit organisations, including Cancer Council Australia, members of boards and committees are unpaid and therefore volunteers. There are also volunteers in member organisations assisting with a range of community-based activities and services. Cancer Council Australia and its members provide documented guidance on the roles and responsibilities of these diverse positions; it is assumed other not-for-profit organisations do the same. While there is merit in encouraging all organisations to provide such guidance, it would be unfeasible for the specific considerations to be built into the ACNC's remit.

There is also a risk that seeking to formalise such considerations across the sector would add to the administrative burden without community or sector benefit.

**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, not in the context of governance reform. There will always be higher risk scenarios – e.g. large sums of money being handled by larger charities, organisations with a defined role related to public health etc. However, a range of established legal and financial instruments are applicable to such cases.

Seeking to articulate standards in this context, through the ACNC's remit and/or amendments to legislation, would be unfeasible.

**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?**

This question itself illustrates the diversity of not-for-profit governance structures and the instruments under which they are established – which often depends on scale, capacity, model (e.g. statutory, national, federated, religious etc.).

Ideally, a single Commonwealth legislative instrument articulating the core legal responsibilities of entities would be supported. However, it would be a huge undertaking, given the fragmentation of current instruments across Australia's federation (as outlined under the Existing Arrangements chapter of the consultation paper).

If streamlined Commonwealth arrangements were feasible, Cancer Council Australia would support the use of the *Corporations Act* as a guide, provided adequate consultation occurred to minimise any disadvantage to organisations established under different structures.

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

Cancer Council Australia would support greater sector-wide transparency and disclosure of governance arrangements, provided this did not translate to an increase in administrative burden and was not at odds with, for example, Australian Accounting Standards Board (AASB) reforms to simplify formal financial reporting through reduced disclosure. (Our organisation already provides such information – e.g. governance arrangements such as committee memberships, policy development, director appointments etc. – in its annual report and elsewhere on the organisation's website.)

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

No. Disclosing the remuneration of responsible individuals should be governed by existing standards and legislation, such as the *Corporations Act* and other relevant instruments. Disclosure beyond current requirements would be out-of-step with privacy provisions that protect the interests of employees in other sectors.

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

The suggested criteria are appropriate, but they replicate existing criteria under ASIC and the *Corporations Act* (e.g. for organisations limited by guarantee). Cancer Council Australia does not support the introduction of a new law requiring all organisations under the ACNC's jurisdiction to comply with a "conflict of interest" policy. This is essentially because current arrangements are adequate for our organisation and members.

However, we understand that some not-for-profit organisations, particularly those whose core work involves potential conflicts of material interest (in forms that ours does not), may seek clarity in this area. We would, therefore, support moves to strengthen requirements for organisations (e.g. those established as unincorporated associations) to comply with existing laws, provided this did not impose additional administrative burden on our members.

**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)?**

No, not from Cancer Council Australia's perspective. It could be argued that some not-for-profit organisations and their stakeholders (e.g. native title groups, as per consultation paper) would benefit from enhanced rigour in this area.

However, there would be no obvious benefit for organisations such as ours whose core business is health promotion. On that basis, for most entities the proposed legislative requirements would be burdensome, weakened by divergent interpretation in practice, and unjustifiably costly to regulate above and beyond compliance with existing standards and laws.

**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'?**

In our view it would be unfeasible to stipulate types of conflict of interest. Such stipulation would also be unnecessary, overly prescriptive and unfeasible to enforce, beyond the current legislative framework.

In general, the Corporations Act and other legislation relating to the establishment of not-for-profit organisations provide adequate guidance for good governance practice in the context of conflicts of interest.

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

While we would welcome in-principle feasible moves to reduce the risk of fraud, misappropriation of donor funds etc., financial and other fiduciary responsibilities should be retained by individual organisations in accordance with a range of established legal instruments.

In general, not-for-profit organisations should be subject to the same risk management requirements as commercial and government organisations; the same financial management, auditing and disclosure principles should apply.

Legislating financial risk management requirements specifically for the not-for-profit sector would put organisations at a disadvantage compared with entities in other sectors, by imposing additional administrative burden on bodies with relatively fewer internal resources to meet such a burden.

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

No. Again, such requirements should be the responsibility of individual organisations. While we understand the desire to assist organisations in remaining viable, self-determination according to individual organisations' constitutions should be allowed. Prudent financial management should be a core role for directors of all organisations, as part of a duty of care to act in the best interests of stakeholders and the ongoing sustainability of the entity.

Mandating the development of measures such as an investment strategy would disadvantage a significant numbers of organisations, which would lack the capacity, either internally or externally, to comply. Moreover, such a mandate is overly prescriptive and would diminish director responsibility, flexibility within an entity and potentially lead to missed business opportunities.

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

No. It would in our view be prohibitively expensive for a significant number of entities to meet the financial burden of mandated minimum insurance requirements; it might also result in price gouging by insurers.

Insurance requirements are adequately regulated under existing standards and laws.

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

No. As above, firstly it would be prohibitively expensive for individuals representing not-for-profit organisations to have indemnity insurance. Secondly, requiring individuals to be insured implies a level of legal professional culpability currently extended only to highly paid professionals such as medical practitioners. Thirdly, there is no evidence that not-for-profit organisations are inadequately insured or of any perceived inadequacy causing loss or misuse of donor funds.

Requirements for responsible individuals under existing standards and laws provide adequate protection against risks. On current evidence, the only beneficiaries of individual indemnity insurance would be the insurers; there would be a substantial net loss to the community, as donor funds provided for community benefit would be diverted to unnecessary insurance cover and would not add value to the sector.

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

Internal review processes are, by definition, a matter for individual organisations. Best practice should be encouraged, along with greater transparency. However, it would be unfeasible to mandate internal review procedures.

Instead, Cancer Council Australia would support simplified and clearer reporting requirements, so that organisations which developed and adhered to their own review procedures would benefit, along with their stakeholders.

An opportunity might exist for the ACNC to develop and promote improved self-review technologies, for the optional use of individual entities.

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

The core minimum requirements are consistent with those set out in existing corporate laws and, therefore, do not require replication in specific legislation for not-for-profit organisations. As a company limited by guarantee (noting that not all our members are structured this way) we support in practice the *Corporations Act* approach of “setting minimum rules” and having “replaceable rules”.

The ACNC could develop and promote model constitutions based on these minimum rules and replaceable rules, encouraging not-for-profit organisations to tailor them to their individual needs. For example, this could assist smaller organisations in the development of appropriate governance documentation without requiring expensive legal advice.

### **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?**

We believe that more structure and transparency around governing rules could assist the public in determining whether charities they support are engaging in good governance practice.

On this basis, the ACNC could have a central role in publishing organisation’s missions and annual reports, and linking websites, assisting donors in choosing a charity to support.

Mandating this through legislation would, however, be problematic. Publishing entities’ constitutions would also be problematic and difficult to sustain.

Instead, by acting as portal for organisations voluntarily providing information, the ACNC could act as a one-stop shop for people looking to support a charity by linking more general information, such as mission and objectives.

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

The ACNC should have adequate authority to support rules relating specifically to its brief.

However, as emphasised throughout this submission, Cancer Council Australia believes that most of the ACNC’s core role should be the development and promotion of materials for the optional use of not-for-profit organisations. As stated, in most cases improved governance arrangements in the sector cannot be achieved through duplicating legislation and mandating business requirements such as insurance – which would lead to increased administrative burden, increased costs and a significant net loss to the community.

Enforcement could be achieved through memoranda of understanding with established enforcement agencies and the *Corporations Act*. Without adequate enforcement and subsequent consequences, rules are meaningless.



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

No, existing authorities are sufficiently capable of managing enforcement and alteration of relevant governing rules. Empowering the ACNC to undertake such enforcement would duplicate existing systems at a cost to tax payers and potentially to the detriment of NFPs. This type of action is not what we would envisage as the mandate of the ACNC.

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

Not mandatorily. However, as stated in response to question 21, model rules could be developed and disseminated by the ACNC and adopted optionally by organisations, as a way to encourage greater consistency in governance structures across the sector, reduce the cost of legal advice and enhance the ACNC's role in providing guidance rather than enforcement of rules.

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

Governance rules already exist within established legal instruments (e.g. laws applying to incorporated associations, companies limited by guarantee, entities set up under individual statutes etc.).

Seeking to extend the ACNC's remit to "mandate the relationship between an entity and its members" would risk adding another layer of bureaucracy and administrative burden to the current labyrinthine arrangements existing across Australia's federation.

Therefore, as per question 26, we support the development and promotion of model rules that could be adopted optionally by not-for-profit organisations and which could, over time, translate to greater consistency across the sector.

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

No. Existing laws provide sufficient safeguards against risk.

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

Yes, we would agree that it is good practice for organisations to meet at least once a year. However, meeting requirements would differ significantly depending on the scale and remit of an organisation.

Mandating meeting requirements through a new instrument may therefore be problematic and duplicative. The majority of organisations registered with the ACNC would already have compulsory meeting requirements according to the *Corporations Act* etc., so new requirements under the ACNC, if introduced, should only apply to entities not already covered by established instruments.

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

As discussed throughout this submission, Cancer Council Australia believes a move to greater consistency and better governance practice would benefit both the not-for-profit sector and the wider community.

However, seeking to underpin this with legislative reform would be problematic and burdensome. As stated, the ACNC could have a useful role in developing and promoting governance models for optional adoption by organisations according to their specific requirements. The ACNC could also facilitate greater transparency by acting as a portal for organisations to disclose their governance arrangements to potential donors/supporters.

### **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?**

There are a number of key priorities for ensuring the ACNC's promotion of governance requirements leads to less, not more, administrative burden, including:

- Ensure that legislation/regulation does not duplicate measures already in place with which not-for-profit organisations must already comply. We support greater consistency, but this will need to be achieved over time – not through another layer of law and bureaucracy.
- Ensure legislation is not used to promote best practice that would be better achieved through voluntary/optional adherence, according to individual organisational needs and market forces.
- Ensure governance principles are consistent with established rules already applied to not-for-profit organisations and supported by government organisations throughout the federation.

As stated by the Institute of Chartered Accountants, the ACNC needs to become a “common denominator” and its reporting recognised in regulation, operational guidelines and contracts. It needs to negotiate with state and commonwealth agencies to ensure governance requirements are uniform before developing an ACNC model. Currently, any requirements developed by the ACNC will result in more administrative burden, not less.

At the outset, the ACNC's focus could be on not-for-profit entities whose legal structures are not regulated by existing legislation.

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

As stated, the “principles” of good governance should be articulated in guidance materials, rather than in legislation or regulation likely to duplicate (or worse, be out of step with) established legal and regulatory instruments. These could include, inter alia:

- duties of responsible individuals;
- requirements for a constitution enshrining an entity's purpose or objectives;
- general meeting requirements;
- basic governance reporting information, such as that currently included in the director's report required for limited by guarantee companies.

Again, by acting as a portal for organisations voluntarily reporting their adherence to these principles, the ACNC could help to provide a competitive advantage to entities visibly engaging in good governance practice without additional legal red tape.

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

N/A.

**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?**

As stated in our overview, appropriate governance is bound by a range of established legal/regulatory instruments; “good” governance – where an organisation actively seeks to engage in best practice for the benefit of its stakeholders and the wider community, should be a matter for individual organisations to pursue.

Moreover, as Cancer Council Australia has stated throughout its responses to government consultations on not-for-profit sector reform, the keys to an improved sector include:

- reducing administrative burden, including direct financial costs, to organisations, thus ensuring more donor funds are allocated to achieving an organisation’s mission;
- greater transparency, to provide potential donors with more information about the charities they choose to support; and
- protection of concessions such as tax deductibility status, without which not-for-profit organisations would become unviable, with great loss to the community.

Enhancing governance arrangements for the sector would not in our view achieve these goals if it is done by applying another layer of law and administrative burden, enforced by the Australian Charities and Not-for-profits Commission (ACNC).

The ACNC does in our view have significant scope to assist in the development and promotion of improved governance. However, in most cases this will need at the outset to be encouraged, rather than mandated, until such time as uniform laws exist across jurisdictions and the multiple government agencies involved in monitoring and enforcing current arrangements.