

Response to The Treasury Review of Not-for-profit Governance Arrangements



January 2012

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Contents

1.	About CCSA	2
2.	Introduction.....	3
3.	Response to Questions	4
3.1	Responsible Individuals' Duties.....	4
3.2	Disclosure Requirements and Managing Conflicts of Interest	6
3.3	Risk Management.....	7
3.4	Internal and External Reviews	7
3.5	Minimum Requirements for an Entity's Governing Rules	8
3.6	Relationships with Members	9
3.7	Summary	10
4.	Conclusion	11

1. About CCSA

Community Connections Solutions Australia (CCSA) is a peak body that aims to facilitate quality outcomes for children through the provision of integrated management, industrial relations, governance and operational support to early childhood education and care services.

CCSA has been operating for more than 42 years and has a strong knowledge of the issues faced by children's services in rural, remote and regional areas. We run an annual program of regional training including forums and workshops and consultancies on specific issues faced by children's services. CCSA has a strong base of knowledge and experience in these regional areas, a close relationship with its member services and a continuing commitment to regional and remote NSW.

Currently CCSA has 600 members across NSW.

CCSA operates Business Solutions, which provides accurate and timely payroll and bookkeeping services, providing further effective financial management support for members.

2. Introduction

CCSA believes it is imperative that both managers and committees understand their role within the context of the governance model and its overall purpose - clarity and understanding provide the foundation for effective governance and management.

To achieve this, more resources need to be put into the governance model. This position is supported by the recommendations of the Productivity Commission in its report on the contribution of the not-for-profit sector regarding government investment in regard to '*building sector capabilities to improve governance and enhance productivity*'.¹ It is also highlighted by the Director's Social Impact Study 2011, which showed that smaller non government organisations struggle to attract good people to their boards.² However '*in such cases the offer of a modest fee will make it much more likely that they can entice experienced directors with relevant backgrounds*'.³ It is also our experience that many people participate in volunteer management because they have an altruistic desire to contribute to the community. For these people remuneration is not a factor, however, CCSA contends that all volunteers benefit from resourcing which in turn benefits the ultimate output and outcomes of the board.

The Social Impact report continues that non-Executive directors on not-for-profit Boards spend approximately 7 working weeks a year on their duties, 90% of these on a voluntary basis. It is interesting to note that 50% of respondents to the survey thought the quality of Governance was as effective as for-profits. It is also interesting that the level of complexity faced by directors on not-for-profit boards was considered to be higher than that of for profits.

¹ Productivity Commission, *Contribution of the Not-For-Profit Sector*, 2010

² Australian Institute of Company Directors, *Directors' Social Impact Study 2011*, <http://tinyurl.com/77jz724>, viewed 15 November 2011.

³ Bosch H, Expertise of Directors of Not for Profits, *Board Report*, October 2011, p.5.

The risk highlighted by the current consultation paper is that potentially more onerous governance requirements could be placed on not-for-profit than for-profit entities if the expectations of compliance and regulation are different. There are also potential problems caused by expecting an entity to fit into a pre-conceived structure rather than allowing flexibility.

Community managed services and other not-for-profit (NFP) governance structures are capable of operating well if a flexible structural framework is provided by government which recognises and supports the importance of effective governance and management.

If we require good governance then we need to enable it.

3. Response to Questions

3.1 Responsible Individuals' Duties

- 1. *Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties too?***
- 2. *Who do responsible individuals of NFPs need to consider when exercising their duties? Donors, Beneficiaries? The Public? The entity, or mission and purpose of the entity?***

CCSA recommends that the definition of responsible individual needs to be clearly stated to delineate between those who are in positions of governance and those who are in positions of management but who have a role in working with and supporting the governance structure.

CCSA agrees that the legislation stipulates who the responsible individuals must consider when exercising their duties, and to whom they owe duties to. At a minimum this would include members, those receiving a service or benefit and the mission and purpose of the entity. However in terms of donors and funders (private or public), while there is a need for a level of financial accountability this should not limit the NFP in providing services. That is, the demands of donors and funders should not dictate how the service is provided, especially where a NFP may need to change direction in order to meet changing needs in its community.

CCSA acknowledges that government funding is usually provided for specific purposes. Departments will prescribe outcomes and delivery methods within contracts (based on research, evidence or proven practice) which is a reasonable expectation regarding the spending of public funds. It would seem to be a complex and difficult task to regulate for outcomes which will change over time in relation to identified need.

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

CCSA supports the following as the core duties required and outlined in the ACNC legislation:

- A duty of care, diligence and accountability
- A duty to act in good faith in the best interests of the entity, its members and/or beneficiaries and for a proper purpose
- A duty not to misuse their position
- A duty to be well informed
- A duty not to misuse information

- A duty to disclose and manage conflicts of interest
- A duty to properly financially administer the entity and prevent insolvent trading

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 and lay persons?

The discussion paper describes the minimum standard of care as 'exercise the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others'. This would appear to be a reasonable minimum standard. However the standard of care must remain the same regardless of whether there are paid or voluntary Board members or professional or lay person. Each person has the same level of responsibility to govern the organisation in an effective manner and this does not change whether the organisation is a small NGO or a large for profit entity. Reporting requirements may be adjusted to account for different sized organisations but this is separate to the duties required of the governing body.

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)?

CCSA argues that a more useful requirement is that the not-for-profit entity is required to provide information and education about the expectations and responsibilities of their governance structure and responsible individuals. To enable this the ACNC must provide access to best practice guidelines and education/information sessions on governance, including highlighting the importance of attaining relevant qualifications. This is especially important as many responsible individuals will need to be informed but do not know what they need to know.

The cost implications of further training have to be addressed by the ACNC. A Certificate IV in Business Governance can cost \$1995, a certificate in Governance for Not-for-profits through Chartered Secretaries Australia costs \$2100 for members and \$2970 for non-members and the costs increase if a person wants to access a Company Director's course. As most not-for-profits will have 6 – 10 responsible individuals on their governance structure plus internal direct-employed responsible individuals the costs become prohibitive. Therefore the Government needs to commit to funding every responsible person, involved in a Government funded NFP, to attend a relevant course by providing a specific level of funding for this to the NFP sector on a permanent ongoing basis. After all Board members change.

It is also difficult to require a person to have particular experience or skills. For example an Early Childhood Education and Care service will need some people with relevant experience in this sector, whereas an employment agency needs people with knowledge of the employment sector. Therefore the NFP entity should be left to determine what particular experience and skills it requires of its Board members that reflect its purpose and strategic direction, with the likelihood that the latter will change over time.

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?

CCSA prefers those duties to be based on the Corporations Act.

3.2 Disclosure Requirements and Managing Conflicts of Interest

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

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

The underlying principle here is that any information that not-for-profits are required to disclose should be applied equally to for-profits. Therefore not-for-profits must provide all information publicly that publicly listed companies provide. Most NFPs produce an Annual Report that provides a clear report on the activities and financial situation (as per the Australian Accounting Standards) of the NFP. It is only those NFPs that currently do not do this that will need to change their practices.

Additional information that may ensure that good governance is in place could include a report on board members showing the training and evaluation they have undergone each 12 months. The Corporations Act already requires the reporting of attendance at Board meetings by directors.

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

Laws in NSW currently cover Conflict of Interest and it is beneficial to see this expand across the whole NFP sector.

CCSA supports the criteria listed as appropriate.

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

The proposed criteria should cover this situation however these types of issues will need to be taken up on a case by case basis. There may be particular issues where one group has dominance over another group, who could also be beneficiaries, and this may require a specific type of conflict of interest requirement. Similar issues may also arise in rural and remote locations where there is a limited population and the people providing the service may be related to the people receiving the service. For example in early childhood services the governance body often consists of parents who do not want to see their fees increase whereas the service may need to increase fees to continue services or meet government requirements.

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'?

As noted in the discussion paper 'material personal interest' is not defined in the Corporations Act and is interpreted through the application of case-law. There are many Good Governance Guides available that provide clear direction on best practice in managing conflict of interest. Alternatively the NSW Associations Incorporation Act has a broader definition that may be more useful than the Corporations Act for the NFP sector.

The consideration of non-material personal interest may also be required where patronage and social influence may have strong impacts, e.g. in small communities or common interest groups.

However if the Corporations Act definition is used then clear examples of what this means must be provided to the not-for-profit sector. It should also be noted that the word 'material'

is not commonly used in the sector and it may be more beneficial to use a word that has meaning within the sector.

3.3 Risk Management

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

NFPs that receive Government funding already have quite stringent reporting and risk management processes in place in many cases. However, this is not true of the Early Childhood Education and Care sector where there are significant numbers of services operated in local communities by volunteers. In situations such as these it would be useful for a minimum standard to be required. This must be accompanied by information and support as to how this might be achieved in practice on an ongoing basis whether directly through the ACNC or by peak organisations.

CCSA does not have experience with entities that rely on donations so cannot determine whether or not their processes are appropriate.

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

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

CCSA can see the benefit of requiring NFPs to have an investment strategy in place and a mandate for minimum insurance requirements. Many smaller NFPs are unsure of these types of requirements or have inadequate risk management and insurance processes in place.

CCSA notes that the ACNC will take over requirements that are currently covered by Government Departments. Most Government funding contracts dictate the minimum insurance and risk management standards required of the not-for-profit before they receive funding. Therefore best practice will be for the ACNC to maintain this as part of their regulation of the NFP sector.

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

In general terms, the smaller the organisation the greater the risk to individuals, often due to limited resources, knowledge and capacity. Regulation can prescribe a minimum that informs (and can therefore protect) individuals. In some situations contracts provide this but not always. It seems reasonable that all individuals having the same responsibilities and obligations be afforded the same protection.

3.4 Internal and External Reviews

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

At a minimum a financial audit should be mandated regardless of the size of the entity and an annual report should be made available to relevant individuals. The Annual Report could be produced online to reduce costs to smaller NFPs. Medium to large NFPs should also produce a Director's report.

It would be helpful for there to be direction regarding what must be included in an annual report (at a minimum) to ensure that the operations (and outcomes) of an organisation are reported effectively to members and interested parties and would be particularly useful for small NFP's. CCSA supports a proportional reporting approach is taken regarding the size of the organisation as suggested in 6.3.1.

Paragraph 148 addresses the notion of audit involving governance requirements and the need for review. CCSA agrees with this principle where there is direction, support and resources made available to assist organisations to govern well and where the process is proportional to the size of the organisation.

3.5 Minimum Requirements for an Entity's Governing Rules

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

CCSA believes that the core minimum requirements for governing rules include:

- Constitution
- Objectives, Vision, Mission, Principles, Goals
- Governance Policies including membership, meeting procedures, financial management, risk management, voting, dispute procedures, office holders etc.

CCSA supports the Code of Governance for the Australian Community Sector as a starting point for policies that govern the operation of the Board.⁴ The Code covers:

- Board membership
- Collective commitment
- Democratic governance
- Management of the board
- Direction
- Risk management
- Accountability
- Transparency
- Community responsibility
- Environmental responsibility
- Diversity and empowerment
- Ethical Fundraising
- Effectiveness

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 could have a role in mandating requirements of the governing rules but this would have to be flexible enough to recognise that over time the mission of an entity may change. The ACNC should not be the body that determines what that mission is. In terms of the interests of the public this will have to be flexible enough to recognise that some entities are fully funded by Government/donations whereas others generate their own income and have a responsibility to their members only.

⁴ It can be found at <http://www.ourcommunity.com.au/files/governancecode.pdf>

23. Who should be able to enforce the rules?

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

Currently there is no where for not-for-profits boards to take issues when responsible individuals are breaching good governance. Therefore if the ACNC is the regulator of the NFP sector then it would make sense for the ACNC to be able to enforce the rules.

This can be done in a similar manner to that currently used for workplace safety with officers of the ACNC able to oversee compliance and deal with disputes with the power to direct compliance of an organisation or individual. In relation to disputes it would enable resolution in most cases without the need for costly and drawn out legal intervention. In more complex and difficult situations the creation or use of a tribunal as a resolution mechanism would be necessary. It is important that most issues and /or disputes are dealt with in a timely manner so having ACNC officers available would enable this outcome.

However, as with any disputes or compliance process, there must be a clear procedure in place as to when and how the ACNC will enforce, how this will be monitored, what reporting will be required, the right of appeal and how the process will be handled. This will include a period of support and training for the Board that is breaching the rules.

Alteration of governing rules should happen in full consultation with and participation of the NFP sector.

25. Should model rules be used?

These have proven to be effective for smaller and mid-sized NFPs who do not have the resources to be able to develop their own constitutions. However there should be flexibility or 'replaceable rules' must be maintained to enable entities to adapt the model rules to suite their particular circumstances, situations and needs.

It is also very useful for smaller NFP's to have model rules as a reference when constitutions fall behind good practice (not updated) and a particular issue is not covered. That is, use the current model rules which are usually updated periodically when your constitution doesn't address a particular issue.

3.6 Relationships with Members

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

CCSA believes that current governance rules relating to quorums, notice of general and special meetings, special business, voting processes and committee meetings could be mandated but again the need for flexibility is required, especially for entities in rural and remote areas. There should be a recognition that the entity may also call for meetings separate to the members calling for a meeting, especially where the entity needs to change particular aspects of its constitution due to changes in the entity's focus. It also needs to be recognised that in some instances the entity may need to do something different to what its members want. For example there may be 400 members from one type of group and 200 from another. The 400 want the entity to do something that will be detrimental to the other 200 members. In this instance the entity needs to be able to take independent action. The requirement could be for the decision and reasoning to be recorded.

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

CCSA believes that this is a positive action but some careful consideration will be needed on how best to implement this.

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

CCSA supports this as long as there is flexibility to deal with different circumstances and situations, such as rural and remote issues.

3.7 Summary

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

CCSA maintains that it is critical that governance and management training and support is available for both managers and committees/boards that responds to the unique differences that exist in children's services to other business models.

A clear difference from other business environments is that governance is often the responsibility of individuals and groups such as boards, committees, local government, church groups, owners and corporations who may not have knowledge and experience in the early year's sector. Consequently the individuals within these groups often have little opportunity to understand the difference between children's services and other areas of education or education compared to other business generally. Curriculum development and the way children learn in the early years are often the easiest issues to identify where the experience and perceptions of non-educators do not prepare them well to immediately understand learning in this context. It looks very different to what they know and expect.

Contributing simultaneously with these first factors is that all too often managers (directors, co-ordinators etc.) have training in being an educator but have had little opportunity to develop significant knowledge and skills regarding governance, management and leadership. This combines with the shortage of trained educators which leads to them commonly finding themselves in a management role very early in their career and having the onsite responsibility for running the business. It also regularly occurs without the benefit of having had a positive role model. Subsequent training may then be sought but competes with the day-to-day requirements of being both the pedagogical leader and manager and not always properly supported by appropriate service planning and budget allocation to this area of their role.

Investment in both governance and management is then very important to ensure that the knowledge and skills are developed and sustained across the organisation so that the capacity to operate effectively is maintained. This includes both the individuals and the systems that support them. Such systems include an effective process for retention, succession planning, recruitment and appropriate ongoing support and resourcing for those individuals charged with the overall responsibility and obligation of the service.

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?

One of the easiest ways to ensure this is by removing the requirement for NGOs to report separately on governance to their funding body or bodies and the ACNC. A streamlined process requires the NFP to report to the ACNC and the funding body can then access these reports from the ACNC, thus reducing the ongoing and repeated duplication which currently happens.

4. Conclusion

A significant part of CCSA's support role continues to be assisting services deal with operational challenges and, along with it, increase their capacity by providing accurate and timely information regarding effective staff management practices in relation to both staff and governance.

The demand for this support continues to rise with CCSA's data showing the number of support calls received having risen by over 31% in 2009/10, with written requests for information and support increasing by 40%.⁵ Following the provision of support both the frequency and extent of support reduces having increased the capability of the staff and management through the process.

Therefore CCSA welcomes this review of NFP governance arrangements and hopes that it will lead to better and easier governance in the NFP sector.

If any further information is required please contact Samantha Edmonds, CEO, on either (02) 4782 1470 or samantha.edmonds@ccsa.org.au

⁵ CCSA is the only sector specific organisation providing this support across all types of ECEC providers in the sector in NSW.