



Deakin University response to:

Review of not for profit government arrangements

Consultation Paper
December 2011

24th January, 2011

Commonwealth of Australia –

Review of not for profit government arrangements – Consultation Paper
December 2011

REQUEST FOR FEEDBACK AND COMMENTS

The Government is seeking your input to the governance arrangements for not-for-profit entities.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All submissions received will be treated as public documents unless the author of the submission clearly indicates the contrary by marking all or part of the submission as 'confidential' prior to the submission being lodged. Public submissions may be published in full on the Treasury website, including any personal information of authors and/or other third parties contained in the submission. If your submission contains the personal information of any third party individuals, please indicate on the cover of your submission if they have not consented to the publication of their information.

A request made under the Freedom of Information Act 1982 for access to a submission marked confidential will be determined in accordance with that Act.

Closing date for submissions: 20 January 2012

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Comments on the Consultation Paper:

- a. Deakin welcomes the consolidation of this area and the simplification of governance and reporting requirements.
- b. We have concerns regarding university NFP arms or activities—e.g. medical research foundations, foundations, scholarship funds etc.—helpful to coordinate under one entity (the university). Charitable trusts, ancillary trust funds etc. Helpful to have flexible mechanism to support NFP activities of universities via non specified philanthropic donations (e.g. alumni funds) or specified NFP activities (e.g. research funding for projects, equipment, buildings, chairs, scholarships).

Comments on 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?**

Yes, but it must be clear that any list cannot be exhaustive, so it needs to be emphasized that careful consideration of the nature of the specific NFP organisation and their stakeholders is essential to understand this responsibility.

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, the basic stakeholder groups should be identified but the specific nature of the NFP organisation needs to be evaluated. The aims of the entity and the strategy or approach to use of donations should be made clear to prospective donors. Donors should also be made aware of the degree of specificity they have in directing their donation.

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

Responsible parties should have clarity around their duties to different stakeholders. Legal requirements for employees and volunteers must be upheld at a minimum. Fiduciary responsibilities should require annual assessment of the percentage of funding spent on management of the entity as opposed to its core objectives, as this will inform donors of the relative success in achieving the aims. It should also indicate whether it is reasonable to expend more or less on leadership and management.

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 overall standard of care (if this means level of responsibility) should match or exceed that required for employment or volunteering by law. Public expectations of behaviour and legal compliance for NFPs are greater than those for FP organisations, so this needs careful

consideration by each NFP which may result in higher than minimum standards. Defining minimal standards would equate to legal compliance?

- 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)?**

Yes, the responsible parties should have certain minimum levels of relevant experience. For all members (e.g. of a board) it would be an excellent minimum standard to attend an Australian Company Directors course. However, there could be a specific course that is designed for NFP organisations below a certain turnover level to simplify the role for small NFPs. The cut off would need to be reviewed at regular intervals. Also members with financial expertise should be required at turnovers above some cut off to ensure adequate understanding of investment and audit needs. There should be adequate representation from people with direct understanding of the key target areas, but this needs definition in the TOR.

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

This probably depends on the size and the nature of the NFP. “Community” based members may have excellent ties to fundraising opportunities, and thus be of value—though not offering specific expertise in the given area (e.g. Cancer Care). Perhaps a core or required structural entity plus additional members may be a way to allow flexibility as well as definition of responsibilities.

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

Yes, but a set of minimal responsibilities could certainly apply. Some case studies and scenario examples would assist entities in better understanding how these duties might apply to different types of NFP situations.

- 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?**

There should be a requirement for induction or training of volunteers that would be general (e.g. Conflict of interest issues, privacy, etc) as well as training specific to the entity.

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

Instances where an NFP is effectively a non profit arm of a larger entity may require special circumstances.

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?**

It is definitely preferable to base core requirements for all NPOs on a single model. The specific requirements could be adjusted over several levels, so that variations in size, complexity, donor diversity and/or entity objectives could be taken into account. Compliance with regulatory acts and/or bodies should be worked through with appropriate legal assistance.

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

This should be tiered and special arrangements made to assist compliance with international entities meeting Australian requirements. Description of purpose and NFP registration, terms of reference, Board structure, financial report, breakdown of income sources (general), Expenditure report that includes proportional breakdown of expenditure in relevant categories. Col and “business activity” statements to ensure NFP status. Breaches of these would need to carry appropriate financial or registration penalties. Audit and approval systems would need to be standardised.

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

This may carry onerous reporting and checking responsibilities for small entities. Perhaps annual disclosure statements should be required to be held by the entity and auditable. Board Chair must sign statement that these are held and appropriate with audit. Auditable entities identified by \$ turnover (e.g. > \$50-100k).

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

If the suggestion is adherence to a Col policy, we generally agree that this may simplify assurance that responsible parties understand the nature of Col in their organisation. For small entities this may be sufficient. However, with larger entities where breaches of Col have greater consequence, there should be requirements for Col declarations and availability for audit.

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)?**

Any specific conflict of interest requirements would need to be stated. This would certainly be the case for university-based entities that seek donors for research/equipment/building funds, despite the outcome of the funding being of wider public benefit (e.g. better health care; energy savings, cleaner water etc). This would have specific consequences if IP were developed as a result of the NFP funding.

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 suggested in the document, material personal interest is only one type of conflict. Responsible individuals should really consider the full range of Col issues that relate to the NFP and declare these. This process is not that onerous once a system is in place, however the suggestion of a “policy” is overall useful. This transfers responsibility of adherence to the responsible party and has a level of trust associated with the process. Again, this system should be tiered, with specific reporting addressed in a tiered manner.

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

Many of the current requirements (ASIC, Corp Act, State laws) cover these, but needs simpler consolidation and advice on implementation in a tiered manner to ensure that costs are not excessive or inappropriately required for the type and turnover of a given entity. Clarity of purpose, conditions of donation, criteria for expenditure or investment and understanding of risk exposure would all assist in minimising risk. There probably needs to be overarching business strategy that would then allow better identification of risk and planning to minimise 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?**

Given the wide range of organisations that fall under the NFP banner, there should be broad requirements. However a general policy document could address a number of scenarios and provide advice to NFP in this regard.

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

Yes, but again using a tiered approach with requirements relating to turnover as well as risk environment (e.g. local activity vs national or international).

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

Yes, again using a tiered approach. This should be accompanied by advice to NFP in regard to the significance for the type of entity.

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

Annual audited financial reports should be required for all entities with funds above a given amount. This should be standardised with an attempt to simplify processes. Guidelines and recommendations on maintaining financial records should be made available and

encouraged as best internal practise for all smaller entities. Regarding ensuring appropriate governance procedures, it might be reasonable for all entities to require the responsible individuals to sign a statement of “responsible governance” on re-registration as a NFP. This could occur at regular intervals (greater than 2 years, but less than 5 years). This statement of RG could include statements regarding Financial position, Col, Risk, terms of reference, etc. in order to ensure that NFP consider their responsibilities on a regular basis and maintain their objectives (or formally change them).

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

There might be tiers here as well, since many small entities will have difficulty meeting the Board requirements. Having a template of minimal requirements with tiered additional considerations/requirements would assist in best practise. Minimal: provision for membership; arrangements for disputes and mediation; provision for annual general meetings, special general meetings and committee meetings; rules about office holders; rules about funds; provision for the winding up of the association. In addition, the basis for interrelationships with other entities should be clarified in the governing rules. The basis for the latter needs to be better defined within the context of operational and governing relationships.

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?

Yes, coordination of governing rules would be useful.

23. Who should be able to enforce the rules?

This will depend a bit on the structure of the entity. In some cases, any member should be able to enforce, in larger entities the processes would dictate hierarchical enforcement.

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

This may depend on what other legal connections an entity has and whether these can be coordinated. A legal approach needs to be taken.

25. Should model rules be used?

Model or template rules are useful to understand and consider the full range of governing arrangements that might be addressed. Recommendations as to when entities need to consider certain types of rules would also be useful.

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

Requirements for AGMs, meetings of committees, reporting, and minutes should be mandated, depending upon the definition and terms of reference of the entity.

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

A level of reporting on the governance and management of the entity is still essential.

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

Probably, otherwise it would be easy to allow meetings to slip and member opportunities for contribution/interaction/information to lapse.

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 implied above, NFP interaction with other entities can be non-transparent. Where an NFP maintains such interactions as part of its main business, there should be clearer terms of reference and definition/separation of activities that are shared vs independent. Individual Col declarations may not be sufficient to ensure independence.

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?

Although the concept is laudable, there needs to be state and national recognition and willingness to consolidate and simplify. If the new regulator is simply added over the top and entities then have multiple layers of complexity the legal and reporting requirements will become muddy and untenable and leave many gray areas where risk is increased. It is essential that there is truly a 1-stop shop and that personnel in the shop are knowledgeable and committed to effecting changes that assist rather than hinder NFPs.

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

Promotion of the benefits of Best practise rather than punitive approach, recognition of societal value of NFP organisations, consultation with existing statutory bodies, simplification, public protection at appropriate levels, transparency, fiscal responsibility to beneficiaries and donors, attempt to provide flexibility, and modelling examples to assist entities.

It would also be of value if the new ACNC had an advisory role—e.g. advice on difficult or complex governance arrangements or acting in advisory capacity to small entities (the Aust Inst Company Directors offers great support but is quite expensive for small entities). Some information might be provided as on-line tutorials.

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

No known.

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.