



5 January 2012

Manager, Philanthropy and Exemptions Unit
and
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The Treasury
Langton Crescent
PARKES ACT 2600

Submission Response from Our Community re:

(1) ACNC Discussion Paper

(2) Review of Nor-for-profit Governance Arrangements

(3) Australian Charities and Not-for-profits Commission Bill

Please find enclosed our three separate responses to your discussion documents.

Over the last eleven years, Our Community has been at the forefront of many of the matters in discussed in these documents, and in many cases the only organisation that has been willing to provide advice and support to any community group.

I am happy to elaborate further on any of these matters.
Yours sincerely

DENIS MORIARTY
Group Managing Director

01 Find Money

02 Manage Money

03 Jobs

04 Marketing

05 Boards

06 Training

07 Insurance

08 Suppliers

09 Join the Directory

10 Communities in Control

11 Leadership

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Review of NFP governance arrangements

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

This question covers the entire disciplines of ethics and theology, issues that humanity has struggled with for millennia. It seems overly ambitious to hope that they may be averted by the proposed legislation, and some ambiguity would seem both inevitable and desirable, particularly as public perceptions in this area are changing over time.

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?**

Insofar as this question does not overlap with the previous question, NFPs and their officers may justifiably be required to consider the interests of the public that grants them their privileges and are bound by their adherence to the organisation's constitution to consider its mission and purpose.

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 should in this context be to serve the interests of the organisation, which should itself be required to serve its mission and purpose and the interests of the public.

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?**

While some chilling effect might reasonably have been anticipated from holding volunteers and laypersons to the standard of care appropriate to paid employees and volunteers, the history of the past few decades since the National Safety Council case mandated such an approach show little signs of any harmful effects. Courts can apparently in practice be relied upon to temper the full force of the standard in the particular circumstances of NFP officers.

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)?

At this point the category of responsible individuals needs to be broken down further into NFP employees (who plainly require no regulation more severe than that applying to employees of private companies, which is to say none at all) and Board members, where it might conceivably be appropriate to require expertise. Even in these cases, however, the practical difficulties of recruiting experienced volunteers and the philosophical difficulties of placing restrictions on the free and democratic choices of the members override the theoretical advantages of a professionalised Board.

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

As above.

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

No.

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?

Any requirements placed on volunteers face the irresolvable difficulty that as volunteers are by definition subject to no sanctions and offered no rewards there is thus no possible mechanism of enforcement of these requirements. Such strictures would be no more than moral aphorisms, and so not properly the province of legislation.

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

In any areas where greater than normal risks of abuse apply then these matters should be covered by legislation particular to those areas. For example, possible abuses in charity-run retirement homes are best addressed

by legislation covering retirement homes rather than NFP legislation itself.

10. Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?

The preferable alternative would combine the maximum of generality with the least formality, and the obligations of trustees would be the best model.

Consultation questions

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

Disclosure should be required to serve the interests of transparency to the public and accountability to the members and to the regulator.

It would be reasonable to require any NFP, of any size, to submit to the regulator the following materials, to be placed online;

- The organisation's name
- The organisation's purposes
- The organisation's constitution
- The organisation's current Board members
- The organisation's annual financial statements
- The number of members as of the AGM date previous¹

It would also be reasonable to require any organisation to have a basic web page with one or another of the free services covering in addition to the items listed above

- The date of the organisation's General Meetings, to be posted 21 days in advance
- The business to be conducted at any such meeting

¹ To ensure that there are in fact some current members.

- Disclosures of intra-party dealings as in the PAF requirements
- Any further notices to members

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

Again, this question requires separate consideration for employees (no) and Board members (yes, as to whether they are paid: and yes, as to the level of that remuneration)

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

The document suggests that a policy be required, but only implicitly refers to the minimum content of such a policy.

Our Community believes that a minimum policy should include provisions specifying that

- a responsible individual should avoid any conflict arising between their personal interests (or the interests of any other related person or body) and their duties to the entity;
- a responsible individual must not take advantage of their position to gain, directly or indirectly, a personal benefit, or an benefit for any associated entity;
- a responsible individual shall not make use of inside information;
- the personal interests of a responsible individual member, and those of associated individuals, must not be allowed to take precedence over those of the entity generally;
- a responsible individual should seek to avoid conflicts of interest wherever possible. Full and prior disclosure of any conflict, or potential conflict, or the appearance of potential conflict, must be made to the decision-making body. Once the conflict has been declared, responsible individuals must decide whether the responsible individual should:
 - : refrain from voting, or
 - : comply with any further conditions or restrictions or exclusions imposed by the decision-making body.

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)?

The extreme complexity of the provisions covering conflict of interest provisions in such situations (compare http://www.nntt.gov.au/about-the-tribunal/documents/service_and_satisfaction/service_and_satisfaction_members_conflict_of_interest_policy.pdf) underline the necessity of introducing broad provisions with wide discretion rather than any attempt to cover all possible situations in black letter law.

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'?

Any attempt to define conflict of interest precisely would be either too restrictive or too vague.

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

Oversight by the ACNC.

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

Immense practical difficulties, following the *Word* case, would be involved in intervening in the financial decisionmaking of all NFPs. If NFPs are not to be monitored in what they spend their money on, there is little point in monitoring how they get it.

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

If, and only if, the government is prepared to ensure that

(a) insurers are required either through regulation or through the existence of a government alternative to provide coverage at a reasonable rate (i.e. one related to actual costs rather than desired income)

(b) an insurer of last resort exists to cover unpopular or unprofitable

organisations

(c) government assistance to NFPs is increased to recognise the additional costs.

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

If the organisations have indemnity insurance, adding insurance for RIs would merely place them at greater risk of being involved in litigation. The number of cases where these issues have arisen is remarkably small, and the problem is not large enough to justify sector-wide compulsory expenditure.

20. What internal review procedures should be mandated?

Internal review procedures are seldom worth the paper they are printed on. Unless an external review procedure exists dispute resolution procedures are merely timewasting repetitions.

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

Where the organisation has members, provisions allowing members

- To receive notice of general meetings
- To attend general meetings
- To stand for the Board
- to elect the Board democratically
- to access membership lists for the purposes of electoral canvassing
- to appeal against any sanctions imposed by the Board

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?

Unquestionably.

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

Both

a) the ACNC

and

b) the courts

but not

c) state regulators

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

Yes. NFP constitutions should be subject to approval to ensure minimum standards of democracy and accountability.

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

Our Community has for over a decade acted as an independent advice source to Australian NFPs, and on the basis of that experience we are able to assure you that most smaller NFPs are as able to draw up their own constitutions without a template as they are to flap their wings and fly to the moon. Model rules are indispensable.

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

Where the organisation has members, provisions allowing members

- To receive notice of general meetings
- To attend general meetings
- To stand for the Board
- to elect the Board democratically
- to access membership lists for the purposes of electoral canvassing
- to appeal against any sanctions imposed by the Board

- to receive annual reports from the Board

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

This must be resolved on a case-by-case basis.

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

Yes: not only appropriate, but essential to accountability.

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

Not to our knowledge.

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?**

No oversight system can ensure a reduction in all red tape for all NFPs, including, for example, those that are being prosecuted for egregious breaches of the Act; the most that can be expected, or desired, is that there is a reduction in unnecessary regulation, and a reduction in average regulation.

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

- Democracy and accountability
- Transparency
- Adherence to mission

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

No.

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?

Our Community stresses again the vital importance of negotiating transfers of powers with the states to centralise NFP oversight – including the regulation of fundraising -- into a single system. If the ACNC results in no more than the addition of another option to an already overcrowded list it will represent a step backward.

Australian Charities and Not-for-profits Commission: Implementation design

1. **Do you think that the introduction of the Charity Passport would reduce reporting obligations to government?**

Yes.

What are the obstacles to achieving one-stop shop reporting on the basis of the data being collected by the ACNC?

Continuing state presence in this area.

2. **Will the information collected by the annual information statement be adequate for the purpose of achieving the appropriate level of transparency and accountability to the public?**

Not necessarily; there remain public anxieties about such matters as fundraising ratios. As, however, there is no general agreement across the sector on how accounting for fundraising costs, administration costs, and program costs should be managed, no action on these issues should be taken at this stage, further development being reserved for later consideration when more data is available to the ACNC.

3. **Is there any additional information that should be collected and provided to the public?**

The organisation's URL and email address.

4. **Should the Annual Information Statement give charities the option of providing narrative descriptions of the outcomes achieved?**

If this option is to be introduced then this leads directly to the use of the online entries by NFPs for purposes of fundraising and publicity. This would be a good idea in itself, but it does have some consequences for the resources that would need to be invested in user-friendly pages.

5. **Is the SBR taxonomy an appropriate basis for the reporting of financial items to the ACNC?**

Yes.

6. **Is the information collected through the annual information statement appropriate for each tier?**

No. The information requirements of the bottom tier, involving as they do no responsibility to report to the organisation's *members*, are too lax.

7. **The ACNC Commissioner has the discretion to vary an accounting period. Under what circumstances should the Commissioner allow for an alternate accounting period?**

Conceivably when an NFP is closely involved with an overseas NFP with different accounting standards.

8. **Do the ATO practice statements provide an appropriate guide?**

No. They minimise the rights of the NFP and donor, they can be actively misleading, they add nothing to the terms of the Act, they are not intended to be helpful, and they betray in every aspect the ill effects of having helpsheets drawn up by the body that benefits from greater ignorance.

9. **Are the transitional arrangements clear for new and existing charities?**

Yes.

10. **What assistance could the ACNC provide to support the sector's use of online engagement?**

Extensive technical education funding for recognised training courses.

11. **Are there barriers to online reporting or registration? How can the ACNC ensure that it is effective?**

The Australian voluntary sector is quite largely technophobic, and any requirements that are at all technical will need to be supported by a very intense and very extensive support system that is prepared to supply small organisations with technological advice and walk them through the installation and accessing of new reporting systems.

12. Are there barriers to the AUSkey as the ACNC online authentication tool?

Not yet – but hackers will doubtless arrange some. Continuing investment in security procedures will be necessary.

13. Are the proposed principles guiding the ACNC’s role in providing an education function appropriate?

14. Yes – provided that when the Commission refers to “Some peak bodies and other sector bodies in the Australian NFP sector [that] have developed extensive education and support material, and are experienced in delivering tailored advice and training to NFPs” and “other regulators, peak bodies, and professional advisers” and states its intention to “to build on their expertise and not duplicate existing resources” this includes such social enterprises as Our Community, which offers several thousand free helpsheets on not-for-profit governance and administration.

15. What should be the scope of the ACNC’s education role?

If the ACNC confines itself to informing Australian not-for-profits of what they need to know about tax, law, and technology in order to observe the requirements of the new Act it will have its hands full for many years. The Commission should refrain from more general educational efforts until these matters had been fully bedded down.

16. Is it appropriate for the ACNC to endorse education and guidance material provided by other entities (for example, peak bodies)?

The ACNC should not endorse the material of other organisations – such endorsement would then simply be incorporated into the Commission’s own guidance materials, and if that was appropriate the ACNC should have written the material itself. The ACNC should, rather, take a let-a-hundred-flowers-bloom approach, drawing attention to other material (such as Our Community’s helpsheets) that NFPs might find useful without endorsing their contents in any detail.

Exposure Draft - Australian Charities and Not-for-profits Commission Bill

(1) The object of this Act is to promote public trust and confidence in not- for- profit entities that provide public benefits.

Furthering the object of this Act

(2) To further this object:

(a) this Act aims to:

- (i) promote the good governance, accountability (to donors, to governments and to the public generally) and transparency of such entities (including through the provision of educational information to them and the provision of information to the public about them); and**
- (ii) minimise regulatory duplication and simplify such entities' interactions with governments;**

It is not at all clear that item (2)(a)(ii) does in fact further the object of the Act as set out in (1); nor would any provision that was intended to benefit Australian not-for-profits other than by improving their public relations. While I do not anticipate any major problems arising from this disjunction while the government remains committed to the reform of the sector, there remains a potential for winding back the scope of the Commission under other governments.

Furthermore, the extreme contortions required to bring all aspects of "behaviour that damages a particular NP organisation" under the head of "promoting public trust" causes some difficulties; where

1.143 The Commissioner may suspend any or all of the trustees of a registered entity if the Commissioner is satisfied that the registered entity, or any of the trustees of the registered entity, are conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence.

- could a trustee defend themselves by saying that unless the Commission publicised the breach nobody would ever hear about it and thus lose their trust?

is a terrorist entity, criminal entity, outlaw entity or similar entity;

These terms will need to be given very particular definition. Our Community would be opposed, for example, to introduction into federal law of the approach to associations taken by the [various states](#) under so-called 'bikie gang' legislation.

Public benevolent institution

Our Community believes that the term Public Benevolent Institution, incorporating as it does all the case law that the definition of charity was supposed to supersede, should itself be defined legislatively (and extended considerably in scope).

(e) the continuing registration of the registered entity may cause harm to, or jeopardise, the public trust and confidence mentioned in subsection 2- 5(1) (Object of this Act).

It should be stated that the kind of harm attracting these sanctions should arise from the mode of operation of the entity concerned, rather than its objects (that is, that unpopular but legal objects cannot attract penalties).

The reference to 'operations' in this section –

1.106 This circumstance would arise in situations where a specific entity is not necessarily undertaking illegal activities or breaking the law, but certain aspects of its operations are questionable and could put at risk public trust.

- should be strengthened.

(1) The Commissioner may make such investigation as he or she thinks expedient for the due administration of this Act, if he or she has reason to suspect that there may have been committed:

- (a) a contravention of this Act; or**
- (b) a contravention of an Australian law, that is a contravention that:**
 - (i) concerns the management or affairs of a registered entity; or**
 - (ii) involves fraud or dishonesty by a responsible individual of a registered entity.**

It is not clear whether a breach of fiduciary duty by, say, a Board member would fall under this head.

On the other hand, the provisions specifying the Commission's powers to give directions

(e) to comply with the registered entity's governing rules;

(f) anything else as to the way in which the affairs of the registered entity are to be conducted or not conducted, that is necessary to advance the object of this Act.

-- are formidably broad, and Our Community – which receives daily complaints and inquiries relating to constitutional breaches – can assure the Commission that this scoping, however desirable, will require **considerable** resourcing.

The problem would thus seem to be that the Commission is able to give directions in cases where it has not been authorised to make any investigation; and this seems quite likely to cause difficulties. How can the Commission be confident, prior to any investigation, that it has all the necessary information to form ‘a reason to believe’ in the case, say, of an alleged breach of an entity’s governing rules? The two sections should be brought into congruence.

