

**Submission to the Consultation Paper:
Review of not-for-profit governance
arrangements, December 2011**

Introduction

Research Australia is the peak body representing the Health and Medical Research sector in Australia. Independent of government, Research Australia's activities are funded by its members, many of which are Not-for-Profit (NFP) entities.

Research Australia notes that the ACNC Bill aims to:

- promote the good governance, accountability and transparency of NFP entities, and
- to minimise regulatory duplication and simplify such entities' interactions with governments.

In respect of NFP entities in the Health and Medical Research sector at least, Research Australia believes that the second of these aims is more important. The imposition of new, additional governance requirements on entities that are already established and operating under a range of governance structures and legislative regimes as a condition of registration with the ACNC will be of little public benefit. It could, however, serve to add further complexity and regulatory burden to these entities.

Research Australia is of the view that the provision of guidance by the Commissioner to NFP entities on governance matters is a valuable function. Such guidance is a useful complement to principles based regulation, and could include template policies and other documents. The extent to which the guidance is adopted by individual entities is likely to vary however, and will be determined by the nature of the entity, its own structure and resources. There should not be any pressure on entities to follow or implement the guidance.

The following responses to the specific consultation questions are provided within this context. Research Australia has chosen not to respond to some consultation questions.

Responses to the specific consultation questions

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 to?

The legislation should not seek to specify who responsible entities must consider when exercising their duties or to whom they owe duties. With the diverse nature of entities within the NFP sector this will prove to be a very difficult task. As part of the registration process, entities could be asked to identify the group/s to which it is responsible.

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?

As per the comments above, this will vary significantly depending on the nature and purpose of the entity, and will normally be clear from the entity's governing rules, in particular its purpose and/or mission statement.

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

The primary duty of the responsible individuals should be to make decisions in a manner that is consistent with the mission and/or purpose of the entity. Responsible persons should also comply with the entity's governing rules.

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?

Research Australia has no specific response to this question. As a general comment, decisions must be made in good faith, and after appropriate consideration and deliberation. How and what should be considered will depend on the perceived significance of the decision and the individual's own abilities.

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)?

Generally, No.

Consideration could be given to requiring the Treasurer or equivalent individual of larger entities to meet a minimum standard of financial literacy either through qualification or experience.

While there may be some merit in requiring the Chairperson or equivalent of an entity to have some qualification or experience in conducting meetings etc. Research Australia submits that this should not be a governance requirement. Instead, appropriate guidance and training materials could be provided by the ACNC.

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

See the comments above.

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

This depends on the extent of the governance requirements. If the requirements are at a sufficiently high level, standardisation will be possible and may also be useful.

If the duties of responsible persons are more specific, this could impose limitations that lead to inefficient and burdensome governance practices, and detract from good governance. Research Australia, is, once again, mindful of the breadth and diversity of the NFP sector, and the difficulties associated with prescribing standards for all entities to meet.

Research Australia is also mindful that most entities will already have governance obligations imposed on them by other jurisdictions; imposing further, and different, requirements on these NFP entities as a condition of registration will be counterproductive.

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?

Responsible persons need to be accountable to their stakeholder group (normally their membership) while still having sufficient executive authority to ensure the entity functions effectively. At a minimum there should be a requirement for the responsible persons to engage with their stakeholder group.

What form this engagement should take, and the extent to which the views of the stakeholder group must be considered is a matter for the entity's governing rules and should not be prescribed by this 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?

Generally, no. There will continue to be entities whose own structure will impose higher governance standards- eg. entities operating trusts will be subject to a fiduciary duty. There will also be other instances, for example where a condition of government funding requires an entity to undertake certain actions, such as evaluation of a program's effectiveness, or consultation with stakeholders. However the governance standards imposed by legislation on NFP entities should not be higher for different entities.

This should be distinguished from accountability standards for entities. It is, for example, reasonable to impose higher financial and other reporting standards and requirements on larger entities, such as requiring audited financial statements. This is the current situation with the existing regulation of NFP entities.

There is the potential for the ACNC to assist NFP entities by developing national protocols with Commonwealth and State Government funding bodies and regulators for the governance standards and reporting requirements they require of entities they fund or regulate.

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?

Research Australia has no response to this question.

Disclosure

Part 6.2 of the Consultation Paper deals with disclosure and conflicts of interest. Disclosure to the membership or other stakeholder group can be a tool for achieving good governance.

Disclosure to other parties, such as a regulator or to the public would appear to be more a means of achieving transparency and accountability rather than promoting governance. Disclosure for these purposes should not be confused with governance requirements.

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

Research Australia submits that it is unclear to whom this question proposes the disclosure should be made. The primary responsibility for ensuring good governance is to the entity's own governing body, and their primary accountability in this regard is to their membership (or other stakeholder group). The type and amount of information required to be disclosed to the membership is not a matter that should be prescribed by the ACNC Bill or the ACNC itself. This is a matter for the entity.

If the question relates to the information that should be disclosed to the ACNC, Research Australia would question whether it is the ACNC's role to ensure that entities have good governance procedures in place.

The ACNC Bill charges the ACNC with the promotion (rather than enforcement) of good governance of NFP entities, and the Commissioner is to monitor and investigate entities for the purposes of the Act, and enforcing the Act. It is not clear that any information should be disclosed to the Commissioner for the purpose of ensuring good governance procedures are in place. In the interests of minimizing the regulatory burden, all requirements to provide information to the Commissioner should be kept to the bare minimum.

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

Research Australia submits that the disclosure of the remuneration of responsible individuals is not necessary to achieve good governance. There is certainly no reason for public disclosure where the entity is not engaged in fundraising from the public.

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

The management of conflicts of interest and duty are clearly central to good governance. While some generalisation is possible, the types and importance of conflicts that can arise vary significantly from one entity to another. Similarly, the measures available to manage conflicts vary significantly from one entity to another. Research Australia does not support the proposed criteria being prescribed.

While the proposed criteria are generally good, and could form the basis for useful guidance to the NFP sector, there will be situations and entities when these are not appropriate.

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)?

Research Australia has no response to this question.

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'?

For the reasons provided above, Research Australia does not support the specification of particular types of conflicts in the ACNC Bill.

Risk Management

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

It is not apparent that the control of funds from the public (and not all NFP members do control public funds) is a rationale for imposing additional risk management obligations as opposed to different accountability standards.

Research Australia submits that the legislation should not include specific mandatory risk management techniques or requirements for NFP entities.

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, for the reasons provided above.

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

Insurance is a specific means of mitigating risk. The decision whether to insure a particular risk depends on a number of factors including the availability of insurance, the price at which it can be purchased, the entity's finances, and who will bear the financial cost of an event occurring. This decision is best made by the entity.

Research Australia submits that it is not appropriate to prescribe minimum insurance requirements for the NFP sector.

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

No, for the reasons provided above.

20. What internal review procedures should be mandated?

Research Australia does not believe that there are any review procedures that should be mandated. Such an approach is not consistent with principle based regulation.

Governing Rules

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

There are already a range of mandatory requirements that apply to existing NFP entities and their governing rules. No additional governing rules should be imposed on entities that are already regulated under other State, Territory or Commonwealth Government laws.

In the future, it may be possible for a new NFP entity to be created and regulated solely under the ACNC legislation. Where this is the case, it is appropriate for the ACNC legislation to impose minimum requirements. In this case, the governing rules should be required to cover:

1. the purpose for which the entity exists
2. membership criteria (where applicable)
3. the election or appointment of individuals to the governing body and provisions for their removal
4. the authority provided to the governing body to make decisions and take actions on behalf of the entity, and what decisions and discretions are reserved for the broader group.

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 should be able to provide guidance but not mandate requirements.

23. Who should be able to enforce the rules?

Enforcement of the rules rests with the entity's governing body and its membership/stakeholder group.

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

Research Australia has no response to this question.

25. Should model rules be used?

Model rules can be provided as guidance, and it is likely that there will be a high take-up of model rules by new entities that are not required to meet specific legislative requirements in other jurisdictions.

Relationships with Members

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

See the response to question 21.

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

No. It seems likely that non-membership based entities will take a form, such as a trust, or a PAF that already have prescribed governance requirements.

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

No. These requirements should be determined by the entity itself.

Summary

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

Research Australia has no response to this question.

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 already a range of mandatory requirements that apply to existing NFP entities and their governing rules. No additional governing rules should be imposed on entities that are already regulated under other State, Territory or Commonwealth Government laws.

In the longer term, the ACNC may be able to work with other regulators of NFPs to standardise governance requirements for NFPs across jurisdictions.

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

Research Australia has no response to this question.

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

Research Australia has no response to this question.

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?

Research Australia has no response to this question.

Closing Comments

Research Australia's membership is generally at the larger end of the NFP spectrum and consisting of organisations with significant resources and skills. It is a sector that is already under significant scrutiny, and performs effectively.

As such, Research Australia is keen to see the new regulator introduced in a manner that assists the health and medical research sector to increase its efficiency and focus on its core task of improving the welfare of Australians.

There are potential long term benefits to be had from the Government's NFP reforms, particularly from the 'report once, use often' reporting model. However, Research Australia is concerned that the imposition of additional governance requirements on existing NFP entities that are seeking to be registered by the ACNC will increase the regulatory burden without improving the governance or effectiveness of NFP entities.