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YMCA Australia

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Response to Consultation Paper: Review of Not-for-Profit Governance Arrangements

Jan 2012

1.0 Introduction

YMCA Australia welcomes the opportunity to present our views in response to the *Consultation Paper: Review of Not-for-Profit Governance Arrangements*.

As an important component of the current suite of reforms, this review of not-for-profit governance arrangements is a significant step forward in providing a greater level of transparency and accountability within the sector, generating greater confidence for beneficiaries, donors, governments and the general public.

YMCA Australia has been engaged in policy debate with regard to not-for-profit sector reform for many years and we have previously put forward our views through our:

- submission to the *2001 Inquiry into the Definition of Charities and Related Organisations*;
- response to the Exposure Draft of the *Charities Bill, 2003*
- submission to the *2008 Inquiry into Disclosure Regimes for Charities and Not-for-Profit Organisations*;
- submission in 2008 on the *Development of a National Compact* and our response to the *2009 National Compact Consultation Paper*;
- response to the *2009 Productivity Commission Inquiry into the Contribution of the Not-for-Profit Sector*;
- response to the *2011 Scoping Study for a National Not-for-Profit Regulator*;
- submission to the *2011 Inquiry into Mechanisms and Options for the Development of a Capital Market for Social Economy Organisations*; and our
- response to the Consultation Paper: *A Definition of Charity, 2011*.

The YMCA has also participated in numerous not-for-profit sector forums and consultations regarding issues of sector reform.

As an active member of both the Community Council of Australia (CCA) and the Australian Council of Social Service (ACOSS), we would also like to express our support and endorsement of CCA and ACOSS submissions to this consultation.

In conjunction with this submission, YMCA Australia will also be providing our views in response to:

- the exposure draft legislation for the Australian Charities and Not-for-profits Commission; and
- the Australian Charities and Not-for-profits Commission Discussion Paper: *Implementation Design*.

2.0 The YMCA in Australia

YMCA Australia is a national not-for-profit organisation working alongside local communities in metropolitan, regional, rural and remote areas. We work in partnership with government, non-profit groups and partners to provide programs and services to more than 500,000 Australians every week and deliver a broad and diverse range of services and programs.

Our mission is to work together to provide opportunities for all people to grow in body, mind and spirit. We believe this can best be achieved within a framework of preventative health, social inclusion and community-based localised solutions.

The profile of the YMCA in Australia is one of diversity – in terms of our programs and services, the communities we serve and our geographic reach. YMCA Australia also has a diversity of relationships with all levels of government and has a broad variety of revenue streams that support our programs.

In Australia, the YMCA:

- is a federated organisation comprising 30 independent Associations;
- employs over 8,000 staff;
- is supported by over 3,000 volunteers;
- works across more than 600 sites in every state and territory;
- derives 2% of revenue through contributions from the philanthropic sector and public donations;
- derives 4% of revenue from government sources; and
- derives the remaining 94% from the provision of programs and services that are operated on a cost-recovery basis.

YMCA Australia operates across all state and territory jurisdictions and we deliver on our mission in myriad ways. Our organisation, our partners and the communities we serve, have a significant interest in these developments towards not-for-profit sector reform.

The scope and diversity of the YMCA in Australia presents a unique set of challenges in relation to the current regulatory and legislative environment. When considering the issues posed by the existing regulatory framework, the YMCA in Australia is challenged by a number of characteristics, including:

- the variety of legal forms that constitute our organisation. The YMCA in Australia is a federated organisation with YMCA Australia as a Company Limited by Guarantee and our 30 Member Associations as a mix of Incorporated Associations (across each state and territory), Companies Limited by Guarantee, and Associations formed through an Act of Parliament. A number of our Member Associations also have within their structure a variety of sub-entities, some of which are Companies Limited by Guarantee, other Incorporated Associations and unincorporated bodies. Some YMCAs also have corporate sub-entities that are taxable while contributing to the benefit of the community. All YMCA Member Associations have charitable status, and some have separate benevolent arms;
- that as a national organisation, the YMCA in Australia is subject to Commonwealth legislation and regulation in addition to the variety of existing state and territory regulatory frameworks; and
- in terms of our activities as an organisation, the YMCA is engaged across a broad range within the NFP sector including: accommodation; early childhood education and care; out of school hours care; youth services; disability services and health and wellness services. All of these areas are subject to extensive regulatory frameworks and these too vary across jurisdictions.

3.0 YMCA Governance Structures, Principles and Policies

Given the diversity of the Movement and the national, state and local contexts in which YMCA delivers services to the community, it is critical that the highest quality governance policies are adhered to.

Governance arrangements of the National Council of the YMCAs of Australia (YMCA Australia) are set out in accordance with our responsibilities as a Public Company Limited by Guarantee under the Corporations Act (2001). As such, YMCA Australia is registered with the Australian Securities and Investments Commission and we are registered as an Income Tax Exempt Charity. The YMCA in Australia operates under a federated structure overseen by a national body (YMCA Australia) with 30 Member Associations that operate in each state and territory. All YMCA Member Associations are Incorporated Associations and are therefore subject to their respective state and territory legislation. The governance of YMCA Australia is overseen by a voluntary Board of Directors that is elected by our Member Associations and each Member Association is governed by a local voluntary Board of Directors elected by its members. YMCA Australia, through its membership of the World Alliance of YMCAs, controls the rights to the use of the YMCA name and trademarks in Australia. Through a process of licensing and Charter Membership, YMCA Australia devolves the right to use the YMCA name and trademarks in local communities to independently incorporated YMCA Associations.

The strength of our governance structures guarantees strict compliance with all commonwealth, state and territory legislative and regulatory requirements pertinent to the operations of the YMCA.

4.0 Consultation questions

4.1 Responsible Individuals' Duties

4.1.1 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?*
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?*
3. *What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?*

Broad principles that reflect minimum standards and expectations should be incorporated in the legislation to provide clarity in a general sense regarding the duties of responsible individuals. These principles should focus on transparency and accountability, particularly with regard to fiduciary responsibilities and on ensuring an entity is remaining mission-focused. Considering the diversity of the charitable sector, it would be problematic for legislation to be prescriptive regarding specific duties, beyond those that are based on broad and commonly accepted principles. While duties based on fundamental principles should be universally applicable, the standard of that duty will depend on the size and scope of the entity and the 'reasonable person' test should be applied within the context of each entity.

YMCA Australia stipulates through our Membership Review and Licensing Standards that all Board Members are fully aware of their duties under law, including:

- Duty to act in good faith, and in the best interests of the organisation;
- Duty to avoid conflict of interest;
- Duty not to misuse information or position (including confidentiality);
- Duty not to abuse a corporate opportunity;
- Duty to avoid fraud; and
- Duty to act with care and diligence (including not trading while insolvent).

Responsible individuals need to consider all interested groups when exercising their duties as they relate to financial responsibility and purpose/mission and not one group should hold more interest than another. NFP entities themselves will clearly have particular duties and responsibilities to various interested parties such as donors and funders (government or non-government) that will differ from the responsibilities and duties NFP entities owe to their members or consumer/client groups. The duties of responsible persons, however, should be derived from fundamental principles of financial responsibility and ensuring an entity is fulfilling its mission and/or purpose. Where a membership base exists, the primary duties of responsible persons are to that membership and it is the membership that holds those responsible persons accountable. In circumstances where there is a decline in membership, or where members and responsible persons are the same, clear lines of accountability are reduced. NFP entities faced

with this situation need to develop a broader framework of accountability and this is a role that could possibly be played by the ACNC.

4.1.2 Standards of care

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?*
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)?*
6. *Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?*
7. *Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?*

Whether paid or voluntary, the standard of care required to comply with duties for all responsible persons should be the same. While in some circumstances, a professional may be expected to have a higher standard of care, this should not be legislated, but rather be a decision for each entity to make depending on their size, purpose and activities. For example, a Board of Management of a charitable entity may expect the role of Treasurer to hold a higher standard of care in relation to the financial health of the entity whereas individuals representing client/consumer groups (eg: disability, mental health, multicultural, youth or homeless groups) may not be expected to hold as high a standard of care in relation to financial matters. This expectation however, should not override the fundamental principle that the operational success (financial and otherwise) of an entity is the responsibility of the entity as a whole, including all responsible individuals. Minimum standards of care that are based on fundamental best practice principles should apply equally to all responsible persons of an entity.

Unless otherwise specified by existing legislation, the question of whether responsible individuals should hold particular qualifications or have particular skills and experience should be a matter on which each entity decides according to their size, purpose and activities. For example, a charitable entity that is providing services and support to people with a particular medical or health condition, may require that a number of responsible individuals hold medical or allied health qualifications in order to provide appropriate advice about the activities of the entity and to ensure the entity is acting in the best interests of its beneficiaries and its mission.

In terms of financial management and oversight, while an individual entity may stipulate that a responsible individual/s has professional financial management or accounting experience and qualifications, this should not be a requirement in the legislation. The current exposure draft of the Australian Charities and Not-for-profits Commission Bill 2012 includes sufficient standards

regarding financial record-keeping, reporting and independent auditing that are tiered depending on the size and turnover of the entity.

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?*

Volunteers working with NFP entities should have access to a level of protection through legislation and regulation by the ACNC. Many other considerations and obligations of responsible individuals are already contained in existing legislation. As noted in the ACNC Implementation Design consultation paper, many of these obligations are subject to State and Territory legislative and regulatory requirements and working towards harmonisation of these will be an important step. Current insurance protections for volunteers and directors (voluntary) differ and in the future there could be benefits in bringing these into greater alignment also.

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

The particular scope and activities of an NFP entity may present a higher risk such as those entities working directly with children, youth, people living with disability or mental illness. For the majority of entities working with vulnerable or at risk client groups, there is existing legislation and regulation to ensure high standards of care and responsibility are met, including the care and responsibility owed by responsible persons such as directors.

Higher minimum standards should also be applied in accordance with the size and scope of an entity. NFP entities that operate on a larger scale will have both a greater need and a greater capacity to appropriately manage their risk and should be expected to meet a higher minimum standard with respect to this.

NFP entities that enjoy the benefits of taxation concessions, for example through exemptions from income tax, GST or FBT or those that have Deductible Gift Recipient status should be required to meet a higher minimum standard of care also.

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?*

Recognising that there has been a gradual merging of governance expectations between the corporate and not-for-profit sectors, it is important to continue to note the key differences in governance expectations of NFPs, particularly as they relate to the management and acquittal of government funds and expectations associated with funding sourced from the public purse. A harmonisation of requirements of incorporated associations could be informed by the Corporations Act, but it will be important to recognise the differences outlined above in this process.

4.2 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?*
13. *Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?*
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)?*
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 a minimum standard, all entities should be required to disclose and publish their annual reports and financial statements. Charitable entities engaged in fundraising should disclose all fundraising income and expenditure, particularly when a majority of fundraising is drawn from the general public. Remuneration of officers, office holders or directors should always be disclosed, particularly if responsible individuals are remunerated directly for their role as a director. This disclosure should include full details of the remuneration including a description of the activity, position or role. Remuneration of voluntary directors for the provision of particular professional services (for example, if a voluntary board member is paid to assist in the preparation of a tender) should also be disclosed and that measures are taken to ensure this does not present a conflict of interest. Remuneration for incidental out-of-pocket expenses should not be required to be disclosed.

While stipulating the type of conflicts of interest that entities need to disclose and manage, the ACNC should also provide greater clarity on the understanding of 'material personal interest'. There should be a clear requirement for all charitable entities to adhere to a conflict of interest declaration policy based on fundamental principles, recognising that each entity will develop its own policy.

To ensure a higher level of transparency to the general public and to government, NFP entities should be required to provide a 'true accounting' of expenditure related to administration and governance. This recognises the trend to move beyond an historic unwillingness on the part of NFP entities to disclose expenditure that does not directly involve community or client service. By disclosing this information, NFP entities are also providing a more realistic picture to the general public and to government about the level of funding required to ensure good governance and sound administration.

4.3 Risk Management

16. *Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?*
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?*
19. *Should responsible individuals generally be required to have indemnity insurance?*

Risk management strategies implemented by charitable entities will vary according to the entity's size, scope, activities and purpose. Broad requirements that constitute a minimum standard should be mandated, but more particular or specific requirements may be needed for different entities that conduct different activities and this should be determined by each entity. Insurance requirements will be necessary to cover organisations that undertake particular activities or those that employ large numbers of people and while minimum insurance requirements should be mandated, these requirements may need to be structured in a tiered way that has a degree of flexibility.

The issue of indemnity insurance for responsible individuals should be dealt with in a tiered approach. Smaller NFP entities may not have the capacity or requirement for indemnity insurance, whereas larger NFP entities that have a greater scope and are larger in scale in terms of annual turnover, staff and diversity of activities should be required to have indemnity insurance in place for their directors. Unless otherwise required to hold insurance due to their professional occupation (such as medical indemnity insurance), the indemnity insurance for responsible persons should be held by the NFP entity, not the individual.

NFP entities that are delivering services to the community under contract or through government agencies should be afforded a suite of indemnity for the particular activities undertaken. Activities that are delegated or funded by government where NFP entities and their volunteers have limited or no assets should be indemnified by legislation, for example through the Volunteers Protection Acts of the States and the Commonwealth.

Variations and changes in the insurance market (such as changes to public liability insurance) should be monitored and understood by the ACNC as there may be a particular role for the ACNC in supporting the sector when these changes have the potential to adversely affect the continued capacity of NFP entities to operate.

4.4 Internal and External Reviews

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

A tiered approach to financial auditing as outlined in the exposure draft of the Australian Charities and Not-for-profits Commission Bill 2012 is appropriate and may be coupled with an

internal review requirement (depending on the size and turnover of the entity) to mitigate risk and maximise accountability. Review and audit processes that currently exist for some entities in receipt of Commonwealth funding, such as those who receive funding from the Department of Families, Housing, Community Services and Indigenous Affairs are a thorough mechanism for reviewing program quality, organisational capability and governance arrangements. The intention of legislation to mandate minimum requirements in terms of internal review processes should not be to duplicate or supersede these existing processes.

YMCA Australia is committed to high standards of governance, accountability and transparency within our own organisation and we strive for continued improvement in this area. In this respect, we believe the licensing and review model we apply to each of our 30 independent Member Associations is a highly effective and unique measure to ensure the adherence to acceptable standards of management, governance and service to the community.

This process of Membership Review involves:

(i) conducting a review of each member Association every three years (or at an earlier juncture if required or requested);

(ii) examining the operations of each member Association according to three focal areas: mission focus, social/community relevance and institutional/financial viability which may include (but is not limited to) ensuring that:

- the YMCA mission and values are reflected in services and programs;
- there are formal mechanisms to guarantee accessibility to all people in the community;
- the Association Board is acting in accordance with its constitution and fulfilling all legal responsibilities;
- members of each Association Board have maintained YMCA Reporting Compliance Requirements;
- programs and services accurately reflect the diversity, demographic and social needs of the local community;
- a process of strategic planning is undertaken regularly;
- all programs and services are compliant with Commonwealth and State legislation, industry and YMCA best practice;
- adequate and appropriate data is collected about program and service delivery;
- all Associations adhere to Commonwealth and State legislation regarding human resources management;
- an annual financial audit is completed by a registered auditor;
- the Association has endorsed the National Risk Management and Occupational Health and Safety Policies (OHS) or an approved equivalent;
- the Association has endorsed and fully implemented a Safeguarding Children and Young Person Policy (Child Protection Policy); and

(iii) making a recommendation that membership continue, that membership continue with certain conditions or that membership of YMCA Australia be suspended or terminated.

An integral component of this process of internal review is seeking to ensure that our Member Associations are achieving the objects as set out in their respective constitutions and requiring they demonstrate their adherence to mission and purpose.

We believe this process of review and internal audit is an essential component in ensuring that YMCA Australia remains accountable to the community and to government.

4.5 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?*
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?*
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 on wind-up or deregistration?*
25. *Should model rules be used?*

Core requirements of governing rules should as a minimum include:

- a statement of purpose;
- that members not privately benefit from profits or assets;
- asset protection clauses in the event of an adverse event; and
- additional winding-up rules.

Minimum requirements might also include appropriately structured dispute resolution processes. The establishment of core requirements of governing rules may be best developed in a tiered framework that recognises the diversity and complexity of NFP entities.

While the ACNC may have a role in mandating minimum requirements of the governing rules, there should not be any further involvement in mandating requirements unless there has been a breach of relevant legislation and/or a breach of duties by an entity.

The ACNC should have a role to play in enforcing the rules and if there is an alleged breach of the rules, third parties should be required to demonstrate what interest of theirs has been affected by that breach before any action by the ACNC is taken.

The Australian Taxation Office may also have a role if the alleged breach involves the fraudulent misuse of public funds.

The ACNC should also have a role to play in the management and protection of assets in the event of deregistration or wind-up of an entity. More particularly, the ACNC could also play a role in conflict resolution, mediation and dispute resolution between affected parties.

Procedures, services and support used by the ACNC could reflect those currently used by the Insolvency and Trustee Service Australia.

Model rules may be used, but primarily as a guide with several models being available depending on the size, scope and nature of the NFP entity.

4.6 Relationships with Members

26. *What governance rules should be mandated relating to an entity's relationship with its members?*
27. *Do any of the requirements for relationships with members need to apply to non-membership based entities?*
28. *Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?*

As mentioned earlier in this submission (Section 4.1.1) there is a trend in many membership-based organisation that has seen a decline in the numbers and types of members that have a role in direct lines of accountability within the NFP structure. In some cases, this membership exists in governance alone which provides an ongoing challenge for effective accountability mechanisms. Should this trend continue NFP entities will need to find more contemporary ways of achieving an appropriate level of accountability. In the absence of an effective membership base, the ACNC could play a role in providing that direct line of accountability.

4.7 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?*
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?*

Regular and meaningful consultation with registered NFP entities regarding the requirements will be an essential mechanism for the ACNC to assess the degree to which the new reporting framework and legislative requirements reduce red tape for the sector. Success of the new regulatory framework in reducing red tape will depend largely on the harmonisation of all relevant legislation and regulation across state and territory jurisdictions and in addition to this, the harmonisation of procedures across government agencies will be equally important.

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

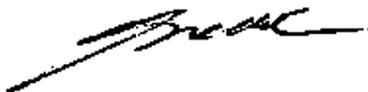
The following principles should be considered:

- Community benefit: core commitments to positive social and environmental outcomes, promotion of volunteerism and philanthropy.
 - Transparency and accountability: commitments to full and accurate assessment and reporting of its social, charitable, benevolent, environmental, and financial performance and impact, including disclosures of governance and administration costs.
 - Effective governance: commitments to self-governance, transparent and democratic processes
32. *Are there any particular governance requirements which would be useful for Indigenous NFP entities?*
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?*

5.0 Conclusion

YMCA Australia welcomes this inquiry in the context of the current suite of reforms and in particular with the establishment of the Australian Charities and Not-for-profits Commission. Establishing minimum standards of governance for the NFP sector will be a critical step forward in elevating the status of the sector and ensuring greater public confidence in the essential services provided by NFP organisations. As mentioned at various points in the submission, much of this work will be dependent on commitment and agreement by the Council of Australian Governments that will lead to the harmonisation of state and territory legislation and regulation affecting NFP entities and governance requirements. In making this submission, YMCA Australia would also like to express support and endorsement of the views of the Community Council for Australia with respect to governance arrangements.

We would welcome the opportunity to discuss any aspect of this submission, if requested.



Ron Mell
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YMCA Australia