



Review of not-for-profit governance arrangements: Commonwealth Government Consultation Paper - Summary

January 2012

Overview

AGPN is developing a response to the Government's Consultation Paper on the *Review of not-for-profit governance arrangements* and is seeking input from Network members to inform its response.

Overall, the intent of the changes proposed in the paper is to streamline and reduce unnecessarily onerous governance requirements for small to medium Not for Profit (NFP) organisations whilst also improving the transparency and accountability of smaller entities by regulating them under an appropriate standardised national framework. Subsequently, the impact on the Network of the proposed changes appears to be low.

A summary of key points from the paper is provided below. The full Consultation Paper can be found [here](#). A list of 33 questions posed in the paper around proposed principles for NFP governance arrangements is also provided at **Appendix A**. Responses to relevant questions will be covered in AGPN's submission. Please provide all feedback, including responses to relevant questions, to policy@agpn.com.au by **COB 25 January**. For any queries regarding the submission or Consultation Paper please contact Scott Brown at sbrown@agpn.com.au or (02) 6228 0832.

Context

In the 2011-12 Federal Budget, the Government announced that it would establish the Australian Charities and NFPs Commission (ACNC), and that Treasury would undertake a review into the governance obligations appropriate for registered NFPs (regardless of entity type), taking account of the findings of the *Final Report of the Scoping Study for a National Not-for-profit Regulator* (Final Report).

The Government's current Consultation Paper seeks views from the sector and other stakeholders about which arrangements work best and what should be the core governance arrangements for NFPs. It is envisaged that there will be some high-level principles-based mandatory requirements for registered entities, as well as some good practice guidance. There may be a number of instruments used, for example, primary and delegated legislation, but it is intended that all the organisation governance requirements for NFP entities will be centralised through the ACNC.

The outcome of the Government's review will feed into the legislation establishing the ACNC, and any legislation relating to issues of governance requirements for NFPs will be in place in time for the commencement of the ACNC on 1 July 2012.

Summary of Government proposals

The principal intent of the governance reforms is to centralise and simplify existing arrangements in order to reduce red tape and minimise compliance burdens for the NFP sector. To achieve this, the Government is establishing a "one-stop shop" national regulator, i.e. the ACNC which will provide a 'blanket' style national governance requirement framework to cover all NFP entities; as opposed to the current system which determines governance requirements based on the type of entity, i.e. limited by guarantee, state/territory incorporated, non-incorporated etc. and what sector the entity operates in.

Following review of the Final Report, the Government is proposing/considering the following governance arrangement features:

- Entities that are currently regulated by the Australian Securities and Investments Commission (ASIC) should be incorporated within the regulatory framework as soon as new reporting and governance frameworks are implemented. ASIC should still retain responsibility for incorporation
- Acquittal reporting should be outcomes based and should not include financial reporting or reporting related to organisational governance
- Organisational governance rules should be proportional to the size of entities, risk factors and receipt of public and government assistance (i.e. entities with high risk, revenue, size etc. will have higher governance/accountability requirements)
- The regulation of service provision should remain with existing entities
- The ACNC will administer the national regulatory system, which will remove or reduce the need for governance requirements to be imposed by other instruments such as government contracts, as risks associated with poor governance will be managed at an organisational level by the national regulator
- It is envisaged that any governance requirements under Commonwealth powers, such as those under the *Corporations Act 2001*, will be replaced with new uniform governance requirements, and not be in addition to existing governance requirements. **This means that the ACNC will take over governance arrangements of NFP companies limited by guarantee from ASIC**

- Any core governance rules developed would be compulsory for entities seeking registration by the ACNC. From 1 July 2012, this will include all charities registered by the ACNC
- Over the long term, the national regulator should be provided with powers regarding asset protection, the suspension and/or removal of responsible persons, registration and deregistration, the enforcement of governance rules, investigative processes, enforcement powers, including civil penalties and the imposition of fines, proportional compliance activities, and dispute resolution processes
- The ACNC will be responsible for administering the legislation, and will not have a legislative function itself
- The ACNC will have a role in assisting NFPs to achieve best practice governance outcomes by producing guidance material which demonstrates what best practice governance is and explaining how NFPs can adopt such practices easily into their day-to-day operations.

Implementation

The ACNC will be established and functioning on 1 July 2012 and it appears that all NFP entities can begin registering with the ACNC from this date. **Most NFP entities will already have adequate governance procedures in place, and therefore it is not expected that they would need to make any substantive changes to existing arrangements.** For those entities needing to make changes as a result of the standardisation, appropriate transitional arrangements will be put in place to ensure a smooth transition to the ACNC.

Impact on the Network

The principal intent of these reforms appears two-fold:

1. To reduce the unnecessary governance requirement burden on small to medium sized NFP entities who do not often have the capacity and resources, i.e. time, finances, expertise etc. to comply with the current regulatory requirements. This burden often inhibits these entities from performing to their full capacity in respect to delivering – what are often – public goods services.
2. To improve the transparency and accountability of smaller entities by regulating them under an appropriate standardised national framework. The current governance arrangements for NFPs in Australia are complex, ad hoc, and can lack transparency; the new national standardised system is expected to address much of these issues.

In its Consultation Paper, the Government lists the governance requirement principles that it proposes to incorporate into the ACNC legislation, with subsequent related consultation questions (See Appendix A and also p. 15-31 in the Consultation Paper link above). **Responses to these questions will inform the development of the ACNC legislation.**

The aim of the principles framework is to be flexible and relaxed enough to accommodate small-medium entities, with larger entities expected to implement additional best-practice governance arrangements considered appropriate for their size, risk etc. These arrangements will be advised/guided by the ACNC, however larger entities will not be forced to comply with additional legislation, i.e. all bodies registered with ACNC will have the same legally accountable requirements (large or small). It is envisaged that Medicare Locals would be classified as 'large' entities (currently any entity with an annual revenue of >\$1 million under the *Corporations Act 2001*).

Given the principal purpose of these reforms, the ACNC principles framework is not expected to impose any additional governance requirements onto Medicare Locals given the robust governance arrangements they will already possess – in the context of currently complying with the *Corporations Act 2001* and reporting to ASIC.

Appendix A:

Consultation questions proposed in the Discussion Paper around principles for NFP governance arrangements. *Responses to these questions will inform the ACNC legislation*

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?
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?
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?
9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?
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?
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'?
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?
20. What internal review procedures should be mandated?
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?
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?
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?
31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?
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?