



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

25 January 2012

Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: nfpreform@treasury.gov.au

Dear Madam/Sir

Review of not-for-profit governance arrangements

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body in Australia delivering authoritative accredited education and the most practical training and information in the field, CSA is focused on improving organisational performance and transparency.

Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, formed to serve the interests of its members, who are governance professionals.

CSA welcomes the opportunity to comment on the consultation paper, *Review of not-for-profit governance arrangements*, (the consultation paper) and draws upon the experience of our Members in formulating our submissions on the matters canvassed in the consultation paper.

General comments

As leaders in governance, CSA Members are very keen to ensure that NFP governance arrangements facilitate good governance practice compatible with ensuring that scarce resources are efficiently and effectively utilised for the constitutionally mandated objectives of NFP organisations. CSA supports the approach set out in the consultation paper of providing core governance principles-based rules that apply to all registered entities across the sector, with the level of regulation proportional to the size of the entity. CSA is of the view that the core governance rules should be compulsory for entities seeking registration by the Australian Charities and Not-for-Profit Commission (ACNC). This ensures that there is confidence in the NFP sector, by providing information to all those who interact with NFP organisations.

CSA supports light-touch regulation and a principles-based approach, which would see high-level requirements relating to governance set out in the legislation, supported by fact sheets, guidance and standards issued by the ACNC to assist NFP responsible individuals and organisations to understand their responsibilities. CSA notes that, while the consultation paper refers to a principles-based approach, many of the questions it raises suggest a prescriptive approach. **CSA strongly recommends** that many of the matters raised in the questions be left to the governing bodies and constitutional documents of individual organisations, rather than form part of the legislative framework dealing with governance arrangements.

CSA also strongly recommends that the ACNC be granted the power to modify the details of the regulatory framework rather than have detailed legislative requirements that must go before parliament whenever change is required.

Another recommendation is that the ACNC be granted the power to either issue instructions or provide relief in approved circumstances, to facilitate compliance while also providing ongoing education to the NFP sector about governance arrangements. This will allow the ACNC to deal with the diversity of the sector and fulfil its education role as well as its enforcement role.

CSA supports the approach set out in the consultation paper that the governance principles should cover:

- duties and minimum standards of responsible individuals, including rules for proper organisational management and running of the entity
- disclosure requirements and managing conflicts of interest
- risk management procedures
- internal and external reviews and auditing requirements
- the coverage of the minimum requirements of governing rules, and
- relationships with members.

However, CSA notes that the governance arrangements dealt with in the consultation paper interact with other consultations in the package of NFP reforms released on 8 and 9 December 2011. The relevant consultation documents are:

- consultation paper for review of not-for profit governance arrangements
- exposure draft legislation to establish the ACNC, and
- consultation paper on the implementation design of the ACNC.

We also note that consultations are proposed in the near future on a review of the company limited by guarantee structure and its continuing appropriateness for NFP entities.

At present it is unclear how these consultations interact. Various of the issues dealt with in these separate consultations overlap. For example, the Exposure Draft – Australian Charities and Not-for-profits Commission Bill mixes legislation that is specific to the formation of the national regulator with legislation that relates to the duties and operation of the bodies which the ACNC will regulate, which is the subject matter of this consultation on governance arrangements. CSA is most concerned that there is such a lack of clarity about the relationship between these three documents and any overlap or inconsistencies contained within them. This makes it very difficult for stakeholders to comment in an informed manner.

CSA is strongly of the view that, even though the consultation paper states that the outcome of the review of governance arrangements will feed into the legislation establishing the ACNC, the exposure draft of the ACNC Bill already provides the ACNC with the power to investigate and enforce breaches of other laws which would include the existing duties and governance requirements. Simplification and uniformity are desired by the NFP sector and CSA is of the view that there is no need to add new governance requirements at this stage. CSA strongly recommends that any legislation in the first instance should focus entirely on the establishment of the ACNC, its constitutional and ancillary powers and how it operates and the duties, operations and governance arrangements of those entities it regulates should be dealt with in separate legislation, with the ACNC participating in the deliberations on how this should proceed.

Time frame for consultation

CSA Members are concerned about the period for consultation, being less than one month and over the Christmas holiday period. Even though the government has now extended the deadline for submissions until 27 January from the original deadline of 6 January 2012, the time frame for the submission of commentary on major reform proposals that will affect the NFP sector for many years to come remains unacceptably short and poses particular difficulties for the NFP sector.

Many NFP organisations are staffed or managed by volunteers, who will be seeking to address the issues canvassed in this consultation as part of their extra-curricular responsibilities. The one-month consultation period over Christmas does not provide sufficient time for volunteers to meet, discuss the proposals and formulate considered responses. Even in an organisation such as CSA, which has paid staff to address policy issues, time is required to liaise with Members and ensure their views are fully represented. Liaising with Members is difficult at Christmas and early in the new year, as many CSA Members take leave at this time. Indeed, we note that serving members of parliament take annual leave at this time of year, as is common for the majority of the citizenry.

It is vital that charities are involved in responding to these reform proposals, given that the ACNC will be regulating charities in the first instance rather than the entire NFP sector. Yet for many charities, Christmas is their busiest time of year, and they will not have had the resources to also attend to this consultation. Furthermore, this is not the only consultation of relevance to the NFP sector that is currently underway.

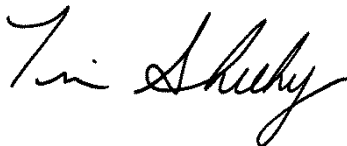
These time frames do not accord with the recommendations of the Banks Report¹ and, in particular, the principle which requires effective consultations with stakeholders, or the government's own guidelines on consultation as found in Appendix C of the Department of Finance and Deregulation's *Best Practice Regulation Handbook* (June 2010), which recommends a consultation period of between six and 12 weeks, depending on the significance of the proposal, citing the United Kingdom Government's Code of Practice on Consultation which stipulates a minimum of 12 weeks for written consultation at least once during the policy development process. They also counter the very intent of the NFP reform process, of which one of the major aims is to reduce the onerous compliance burden on the NFP sector. The NFP sector has traditionally been under-resourced and subject to complex compliance provisions, yet these time frames for consultation place an exceptionally high burden on NFP organisations.

We refer you to our submission on the exposure draft of the Australian Charities and Not-for-profits Commission Bill, where we strongly recommend that the legislation be confined to the formation of the national regulator, with legislation relating to the duties and operation of the bodies which the ACNC will regulate dealt with separately (we note that much of this is the subject matter of the consultation on governance arrangements). In turn, this would allow the ACNC to be a major participant in the ongoing consultation as to how various elements of the NFP sector (and not just charities) will be regulated. It would ensure that the establishment of the ACNC could take place by 1 July 2012, as planned, without the very real risk of introducing a regulatory framework that imposes even further onerous compliance burdens on the NFP sector.

With these considerations in mind, CSA provides the following submission addressing the questions posed in the consultation paper.

We would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

¹ Treasurer of Australia, *Report of the Taskforce on Reducing Regulatory Burdens on Business – Final Government Response*, Media Release, 15 August 2006.

Consultation 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?

CSA is of the view that, while NFP entities may have responsibilities to donors, beneficiaries, volunteers, government, members (where applicable) and the public at large, it is not certain that the responsible individuals of each NFP entity will have responsibilities to all of these parties.

CSA is of the view that the legislation should set out the high-level duties owed by responsible individuals, which ensure that those persons must act with care and diligence, in good faith, and not misuse their position. CSA agrees with clause 87 that 'Responsible individuals must exercise at least the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others'.

Such high-level duties ensure that the responsible individuals of both smaller NFPs, such as local sporting clubs and single purpose charities, and larger NFPs such as the Red Cross or Smith Family, are required to understand their duties. In the fulfilment of those duties, it is for the responsible individuals to clarify who they must consider and to whom they owe their duties. This will vary from organisation to organisation.

Detailing who the responsible individuals must consider in legislation presupposes a one-size-fits-all approach that is the antithesis of a principles-based governance framework. It also makes the role of responsible individual in a NFP entity so onerous that it is unlikely that NFP entities will be able to attract people to serve on their governing boards or in executive positions.

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?

CSA is strongly of the view that responsible individuals need to consider the mission or purpose of the entity when exercising their duties. This clarifies for responsible individuals that they must act in the best interests of the entity in order to achieve that mission or purpose. In the fulfilment of that duty, they will consider the requirements of any applicable laws and they may consider the needs of donors, beneficiaries, volunteers, government, members (where applicable) and the public at large, but it is not certain either that all such parties will need to be considered, or that the needs of these parties are aligned with the best interests of the entity in achieving its mission or purpose. As the mission or purpose of each entity will differ, it is for the responsible individuals to clarify how to act in the best interests of the entity, and who they should consider and to whom they owe their duties in the fulfilment of that mission or purpose.

CSA notes that the ACNC can issue fact sheets and guidance assisting responsible individuals in relation to acting in the best interests of the entity.

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

CSA supports the legislation setting out the duties of responsible individuals as set out in clause 91, that is, that responsible individuals in NFP organisations should have:

- a duty of care and diligence;
- a duty to act in good faith in the best interests of the entity;
- a duty to not misuse their position;
- a duty to not misuse information; and
- a duty to disclose material personal interests.

We believe that the duties of responsible individuals in the ACNC legislation should be principles-based and similar to the duties of officers contained in the Corporations Act. It would be highly prejudicial to the NFP sector should the duties of responsible individuals be more detailed and onerous than those of officers under the Corporations Act.

CSA is of the view that such a high-level statement of duties can be supported by the ACNC issuing guidance on what each duty entails, with illustrative examples to assist those in NFP entities to understand their duties. The ACNC could provide hypothetical case studies to illustrate these duties in practice or real-life case studies to illustrate breaches of the duties where prosecutions occurred.

This constitutes both a principles-based approach to governance and also a light-touch regulatory framework for the NFP sector. Given that one of the aims of the NFP reform process is to streamline governance arrangements and reduce red tape, thus allowing NFPs to spend less time complying with duplicative or burdensome arrangements, and more time helping the community, a light-touch regulatory framework is essential. If detailed duties are embedded in the legislation, NFP entities will find themselves required to consult legal advisers to ensure that they are meeting all of the legislative provisions. The cost and time involved in seeking legal advice would defeat the purpose of the reform process.

CSA notes that such high-level statements of duties are similar to those contained in the *Associations Incorporation Amendment Act 2010 (VIC)* and the *Associations Incorporation Amendment Bill 2010 (VIC)*, both of which were subject to extensive consultation.

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?

CSA strongly supports the minimum standard of care being that as set out in clause 87: 'Responsible individuals must exercise at least the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others'.

Such a standard of care applies whether the responsible individual is in a paid position or a volunteer, or whether they are a professional or lay person. It depends on the role and what a prudent person thinks the role should be.

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)?

CSA strongly opposes responsible individuals being required to hold particular qualifications or have particular experience or skills.

CSA notes that even the directors of public listed companies in Australia are not required to hold particular qualifications or have particular experience or skills, and it would be highly prejudicial to the NFP sector should responsible individuals in NFP entities be subject to more onerous obligations than officers of companies.

CSA notes that members of the NFP organisation are best equipped to judge whether candidates are suited to the role of responsible individual, given the nature of the organisation and the skills of others involved in its governance. Implementing a standard requirement fails to recognise the diversity of the objectives of NFPs and the benefit to society of encouraging people of good character and dedication to a cause to take on responsibilities. Rather, it would place barriers on participation.

It is interesting to note that in countries where minimum educational requirements have been established for the operation of a business, some entrepreneurs have hired persons with the

requisite skills, yet the entrepreneur still effectively manages the business. In essence, such minimum requirements could be both ineffective and inappropriate.

CSA notes that the Australian Securities and Investments Commission (ASIC) currently provides extensive information to officeholders of companies concerning their responsibilities and obligations, including directing them to training and education programs to assist them to fulfil their duties. CSA is of the view that the ACNC can similarly provide links to training and education programs for responsible individuals in NFP entities.

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

CSA opposes the minimum standards only applying to a portion of the responsible individuals of a registered NFP entity.

As noted above, CSA strongly supports the minimum standard of care being that as set out in clause 87: 'Responsible individuals must exercise at least the same degree of care, diligence and skill that a prudent individual would exercise in managing the affairs of others'. Such a standard of care applies objectively, as it depends on the role and what a prudent person thinks the role should be. There is no need, therefore, to seek to define to whom the standard of care applies or does not, which can lead to difficulties in achieving compliance, as there can be confusion as to who is 'in' or 'out' of the definition.

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

CSA does not believe that there are any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC.

CSA is of the view that standardisation leads to better compliance outcomes, as there is greater clarity concerning the duties owed by responsible individuals.

The important issue that is not discussed in the paper is liability. CSA strongly recommends that the ACNC be granted the power to either issue instructions or provide relief in approved circumstances, to facilitate compliance while also providing ongoing education to the NFP sector about the duties of responsible individuals. If the ACNC is granted this power, it will have the discretion to allow for the diversity in the sector and take account of what would be reasonable for the responsible individuals of an entity of a particular size and dominant purpose.

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?

No

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

CSA strongly opposes any higher standard or higher minimum standard of care applying to particular NFP entities. CSA notes such an approach would make it virtually impossible for ordinary people to participate in the NFP sector. CSA also notes that a 'higher risk NFP' is a concept that would be difficult to define.

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?

CSA's preference is for the core duties to be based on the Corporations Act, given that there is a large body of common law that can be drawn on, and it appears to be more readily recognised by the courts.

CSA notes that the core duties as set out in clause 91 of the consultation paper provide an appropriate high-level statement of the responsibilities owed by responsible individuals, including as they do:

- a duty of care and diligence
- a duty to act in good faith in the best interests of the entity
- a duty to not misuse their position
- a duty to not misuse information, and
- a duty to disclose material personal interests.

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

CSA believes that members and stakeholders of all NFP organisations should be able to have access to information that allows them to know:

- the financial position of the organisation
- that the organisation is being managed prudently
- that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution
- who constitutes the governing body and
- what processes are in place to ensure the personal interests of directors do not override the interests of the organisation.

These are issues of accountability, transparency, stewardship and ethical decision making and constitute good governance. These matters are as relevant to the local football club for under-tens as they are to a large NFP such as the Red Cross.

A minimum standard of governance entails several important considerations for all NFPs. First, the reporting framework must not be onerous or burdensome. Any governance report needs to be able to be completed by mums and dads sitting around the kitchen table, with a limited knowledge of accounting and legal principles, but who take responsibility for the NFP organisation, for example, the local football club. It cannot work only for those larger NFP organisations with internal accounting and/or legal resources. This is a key consideration.

Second, it must contain the right information. This means identifying information that is essential to any individual who might deal with that particular NFP. This might include questions such as: who is the governing body? Who are the people making the decisions and in positions of responsibility? Where is the NFP organisation's funding coming from and how is it being used? What are the risk management processes in place? What risks are present? This is not creation or disclosure of intricate risk management matrices but the provision of basic information. For example, at the under-tens local football club; who sits on the management committee? What happened to the \$6,000 raised in sausage sizzles and the trivia night? How much money was spent on new netting and soccer balls? Were any financial transactions entered into between the club and someone on the management committee? Does the club have the right insurance so that if anything happens on or off the field there is protection against liability? This is basic governance information that anyone dealing with the club, whether as a parent, or a supplier or a beneficiary should know.

CSA believes that this kind of accountability could be fostered by requiring a short-form governance report from all NFPs. This mandatory, short-form governance report for all NFP organisations would cover:

- the statement of objectives of the NFP organisation
- the amounts and sources of funding for the activities that the fundraising supports
- the expenditure of the funds (which would assume a portion of the funding going to administration and marketing, as well as to the fulfilment of the objectives of the NFP organisation)
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers
- details of directors and secretary(s) or other relevant responsible individuals and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent)
- disclosure of all related-party interests.

Such a report could constitute only one page for the local football club for under-tens, while a larger NFP might also report an executive summary of only one or two pages, with many more pages of detail sitting behind the summary. Therefore, the report would be tailored as appropriate to the size and resources of the entity.

It is important to stress that the governance report would cover basic financial information (the amounts and sources of funding and the expenditure of funds) for the purposes of transparency and confidence in the NFP organisation. This is a very different matter from financial accounts, which would only apply to NFP organisations of particular sizes. This would not, therefore, add onerous compliance burdens to NFP organisations.

CSA points out that any such governance report deals with the outcomes of a governance framework. The consultation paper refers to disclosures that good governance procedures are in place, which is somewhat confusing. The procedures that an entity puts in place to ensure good governance are an internal matter and not of relevance to stakeholders. However, the outcomes of those procedures are of relevance to stakeholders and it is the outcomes that any governance disclosure should cover.

CSA supports financial disclosure in accordance with the Australian Accounting Standards according to size and resources. However, the consultation paper is not clear on this. The consultation paper notes that: 'Registered charities would be required to submit an information statement in an approved form to the ACNC, and that financial reports will be prepared in accordance with Australian Accounting Standards and lodged with the ACNC for mid-tiered and upper-tiered entities'. We refer you to our submission on the exposure draft of the Australian Charities and Not-for-profits Commission Bill, where the legislation suggests that all registered charities should prepare general purpose accounts. CSA notes that the governance arrangements consultation paper and the draft legislation consultation overlap. CSA opposes all registered charities having to prepare general purpose accounts. For example, a single-purpose charity set up to send a sick child for treatment overseas that sits under the \$250,000 tier should not have to prepare general purpose accounts.

CSA suggests that Tier 1 NFP entities may further be classified as large or small, large being an entity with revenue over \$10million and could be asked to make further disclosures against a set of principles and recommendations modelled on the appropriate recommendations contained in the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (Principles and Recommendations). CSA notes that many larger NFP entities already provide disclosures against the relevant aspects of the ASX Corporate Governance Council's Principles and Recommendations. CSA also notes that the United Kingdom asks for disclosures against the *Good Governance — A Code for Voluntary and Community Sector*, which similarly looked to the UK Corporate Governance Code. The ACNC could develop the guidelines for larger Australian NFP entities in consultation with the sector.

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

CSA strongly recommends that it should be disclosed whether responsible individuals (if any) are remunerated (if at all) but opposes the disclosure of the quantum of remuneration.

CSA notes that not all companies are required to disclose the remuneration of the key management personnel, but that when it is required, this disclosure is tied to financial reporting under the Australian Accounting Standards and is relevant in relation to the deployment of investment undertaken by shareholders. CSA would be very concerned if NFP organisations were asked to undertake more disclosures than the majority of companies in the private sector, which are not required to disclose the quantum of remuneration of officers or executive management.

CSA notes that, in NFP organisations, it is important that stakeholders have clarity as to whether responsible individuals are remunerated, but there should be no obligation to disclose what the levels of remuneration are.

We refer you to our submission on the exposure draft of the Australian Charities and Not-for-profits Commission Bill, where the legislation suggests that all registered charities should prepare general purpose accounts. As these are governed by the Australian Accounting Standards, all registered charities would be required to disclose the quantum of remuneration. CSA does not support this. CSA makes the point again that the governance arrangements consultation paper and the draft legislation consultation overlap. In relation to remuneration, what is important is to know whether the responsible individuals of this single-purpose charity received remuneration, not the quantum.

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

CSA is of the view that the criteria set out in the conflict of interest policy that all NFP entities would be required to abide by are appropriate.

As the NSW Independent Commission Against Corruption has noted: 'Conflicts of interest are not wrong in themselves ... but such conflicts must be disclosed and effectively managed.' Many directors have a multiplicity of personal, domestic and professional interests which may, on occasion, compete with those of the NFP. It is almost impossible to avoid conflicts altogether, particularly in the context of NFPs seeking to appoint directors with skills and experience in the wider economic community.

CSA therefore supports NFP entities being required to develop a conflict of interest policy. The criteria as set out in the consultation paper are that the conflict of interest policy would include 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 a benefit for any associated entity (their spouse/partner, say, or a commercial entity)
- a responsible individual shall not make use of inside information (such as knowing the details of a tender application of a NFP and using this to undercut it)
- 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 what the appropriate action is that should occur as a result, that is, whether the responsible individual should:
 - refrain from voting (this is a minimum)

- refrain from participating in the debate
- withdraw from the meeting during the debate and the voting
- suggest that the responsible individual consider resigning, and
- where possible, develop guidelines on what kinds of appearance of conflict call for what level of care.

CSA is of the view that the criteria capture conflicts of loyalty as well as the more recognisable conflicts of financial interest.

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)?

No conflict of interest is easy to deal with, but situations where directors have a financial interest may be more apparent and more straightforward to deal with than those where they have competing loyalties.

For example, a director may be a user of a service or a carer of someone who uses the service, and such directors may have much to offer a board in terms of life experience and views on the provision and quality of services. However, as beneficiaries of the NFP's services, whether directly or otherwise, user and carer directors may find themselves dealing with many potential conflicts of interest. Responsible individuals might indirectly benefit from a decision because they, or the person they care for, fall within the group of beneficiaries affected. This may arise where the responsible individual stands to benefit as one of a group of beneficiaries (for example, as a resident of one of the organisation's properties, or as a parent of a child in one of the organisation's schools, or where the responsible individual may have an interest in fundraising that provides for their wheelchair-bound child to participate in the Para-Olympics, but this may see less funding available for other children seeking assistance from the service).

As with all conflicts, these will need to be carefully managed. CSA is of the view that the criteria set out in the consultation paper for a conflict of interest policy are as appropriate to the management of such conflicts of loyalty as to the more recognisable conflicts of financial interest. For example, the basic principle regarding user and carer directors is that they should not receive any benefits over and above those that are available to other beneficiaries, and should not be able to influence decisions that have a direct impact upon them. In practice, this means that user and carer responsible individuals should withdraw from discussions and decisions that could result in their receiving a benefit that would be personal to them and not available to other users of the NFP's services. For example, responsible individuals should not be involved in decisions regarding the allocation of equipment or funds to themselves individually, or to the people they care for.

CSA opposes special conflict of interest requirements being required for entities where the beneficiaries and responsible individuals may be related.

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'?

CSA is of the view that ACNC should provide guidance and fact sheets concerning conflicts of interest, including examples to assist responsible individuals to identify such conflicts and manage them. However, CSA does not support ACNC stipulating the types of conflicts of interest that responsible individuals should disclose and manage.

CSA supports the disclosure obligations being based on the Corporations Act understanding of 'material personal interest'. CSA notes that this will encompass all conflicts of interest (including conflicts of loyalty) that may arise.

For example, if a local councillor also serves on a hospital board, the responsible individual may be faced with a difficult decision where the councillor is of the view that the decision is in the best interest of the community, but recognises it may not be in the best interests of the hospital. At this point, the councillor has a conflict of interest, as they must serve the best interests of the mission or purpose of the NFP entity and the appointing minister, and not the community which they represent as a councillor. The concept of 'material personal interest' covers this conflict, even though there is no immediate personal financial interest at stake for the responsible individual.

CSA recommends that the disclosure and management obligations be based on the Corporations Act understanding of 'material personal interest' but also recommends that the ACNC have the power to either issue instructions or provide relief in approved circumstances, to facilitate compliance.

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

CSA strongly opposes NFP entities being subject to additional risk management requirements. CSA notes that public listed companies are not required to implement particular risk management systems or frameworks, and CSA would be very concerned if NFP entities were subject to compliance obligations greater than those applicable to the private sector.

Under a principles-based approach, disclosure would be required of the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers. This would clarify whether adequate record keeping is in place of the amounts and sources of funding for the activities that the fundraising supports; the expenditure of the funds (which would assume a portion of the funding going to administration and marketing) and whether they were dispersed in accordance with the dominant purpose of the NFP organisation; and whether any funds were invested. As noted earlier this report would be one page for small NFP organisations and could be a longer report for larger NFP organisations.

Where funds are raised from the public, disclosure would be required that systems are in place to track the funds from donors to dispersal and this could be subject to audit, depending on the size of the NFP entity. CSA recommends that ACNC be granted the power to request an audit.

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

CSA opposes particular requirements being mandated for NFP entities to ensure they have adequate procedures in place. CSA also opposes a particular investment strategy being mandated for NFP entities. If deemed appropriate, there could be a requirement for each NFP to indicate in their constitution the investment strategy agreed by the managing committee or board. This could be as straightforward as noting that all funds will be held in basic bank accounts, with surplus funds placed into term deposits if appropriate.

CSA supports a short-form mandatory governance report requiring NFP entities to disclose:

- the statement of objectives of the NFP organisation
- the amounts and sources of funding for the activities that the fundraising supports
- the expenditure of the funds (which would assume a portion of the funding going to administration and marketing, as well as to the fulfilment of the objectives of the NFP organisation)
- where funds will be held, particularly donations, while it is determined how these will be dispersed
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers

- details of directors and secretary(s) or other relevant responsible individuals and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent)
- disclosure of all related-party interests.

CSA notes that such a report would ensure that stakeholders had access to the appropriate information about the NFP entity. For example, the local football club for under-tens might disclose that it holds all its funds in a cash account, which would provide information that it does not invest funds.

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

CSA opposes mandating minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances.

CSA notes that it may not even be possible for NFP entities to be issued with such insurance. If it was mandated, this would stifle the NFP sector, with serious disadvantages to the community as a result.

CSA recommends that responsible individuals assess the risk of any undertaking relevant to fulfilling the mission or dominant purpose of the entity and put in place appropriate insurance to achieve the aims of the entity. Prudent financial management is a core and key role for directors of all organisations and part of their general obligations to apply a duty of care and act in the best interests of the organisation and assessment of risk is part of their fulfilment of their duties. It is for responsible individuals to assess whether access to insurance or otherwise is in the best interests of the mission or dominant purpose.

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

CSA opposes any requirement for responsible individuals to take out indemnity insurance.

Again, CSA notes that it may not be possible for NFP entities to be issued with such insurance, and so it cannot be mandated. Furthermore, directors' and officers' insurance may not be the appropriate form of insurance for responsible individuals in NFP entities.

CSA recommends that the ACNC provide guidance and fact sheets to assist responsible individuals in NFP entities to assess and identify risk, so that their decision making is undertaken in a context of risk analysis and assessment.

20 What internal review procedures should be mandated?

At a minimum, CSA recommends that the board or management committee of a NFP entity must review the accounts. All NFP entities, no matter how small, should be required to sign off that the board or management committee has reviewed the accounts.

Any further review, either internal or external, should be dependent on the size of the NFP organisation. The tiered arrangements that companies limited by guarantee are subject to under the Corporations Act provides a useful model for such tiered financial review and reporting arrangements.

CSA notes that, where funding is provided by the public, it may be seen that a greater level of review and audit is required, to instil confidence. However, CSA also notes that audits are costly and it is not appropriate to impose an audit on all NFP entities which raise funds from the public.

CSA recommends that the ACNC have a review entitlement of any entity that it registers. It is appropriate that the ACNC be able to determine if a review or audit is required. It should also be granted the power to change licensing requirements as appropriate.

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

Each NFP entity should be required to have a constitution that sets out a statement of their objectives.

The constitution should prevent the NFP entity from distributing profits or assets for the benefit of particular people — both while it is operating and when it is wound up.

CSA recommends that the ACNC issue model rules, that any NFP entity could use as the basis for its constitution. NFP entities could adopt the model rules without amendment or amend them according to the needs of their organisation.

CSA also supports the ACNC issuing a ‘ready-made’ example of a constitution, complete with places for the members to sign (along the lines of the model rules issued by Consumer Affairs Victoria for incorporated associations), to ensure smaller NFP organisations can easily develop a governing document without recourse to costly legal advice. The document should contain standard definitions; 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 NFP entity, as well as other information relevant to the formation and operations of a NFP organisation.

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?

CSA recommends that all NFP entities be required to lodge a copy of the constitution with the ACNC and that registration as a NFP organisation should be subject to such lodgement.

CSA notes that private sector companies are required to lodge a copy of the constitution with ASIC.

CSA also recommends that a transition period be provided to allow the various and diverse NFP entities to develop a constitution. The ACNC should make the model rules and ‘ready-made’ example of a constitution available as soon as possible to assist NFP entities to meet any registration timetable.

CSA further recommends that the ACNC be granted the power to amend the model rules, subject to providing advice to all NFP entities registered with it.

23 Who should be able to enforce the rules?

CSA recommends that the ACNC and members (if any) be able to enforce the governing rules contained in the NFP’s constitution.

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

CSA strongly recommends that the ACNC enforce governing rules and also approve any alteration to governing rules.

25 Should model rules be used?

CSA strongly supports the ACNC issuing a ‘ready-made’ example of a constitution, complete with places for the members to sign (along the lines of the model rules issued by Consumer Affairs Victoria for incorporated associations), to ensure smaller NFP organisations can easily develop a governing document without recourse to costly legal advice. The document should contain standard definitions; and cover becoming/terminating a member; meetings; minutes; the

appointment of responsible individuals; disputes; and amendment of the rules. Any NFP entity should be able to adopt the model rules or amend them, subject to ACNC approval.

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

CSA notes that a constitution will set out the entity's relationship with its members.

The model rules issued by the ACNC can be used as the basis of a constitution by any NFP entity, particularly those without experience in formulating governing rules. However, any NFP entity should be free to develop a constitution that goes beyond the model rules. The model rules could also operate as do the replaceable rules in the Corporations Act, in that any constitution must deal with the issues covered by the model rules, but they can replace the model rules with more sophisticated iterations, subject to member approval.

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

Requirements for relationships with members are not applicable to non-membership based entities.

The NFP's constitution will set out the requirements that apply to the particular NFP entity.

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

CSA recommends that it is appropriate to require each NFP entity registered with the ACNC to hold a minimum of one general meeting per annum.

Particularly for membership-based organisations, members' meetings are frequently the key window into examining what and how the NFP organisation is undertaking and performing.

CSA notes that the government has recently referred the future of the annual general meeting to the Corporations and Markets Advisory Committee (CAMAC) and the CAMAC consultation paper is certain to provide insights into how a general meeting can assist member engagement with any organisation. CSA is of the view that part of the ACNC's education role should be to promote wider contact with members and other stakeholders.

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

It is possible that there are some types of NFP organisations where specific governance arrangements would assist to achieve better governance outcomes, although CSA is of the view that a principles-based approach will be likely to ensure that all types of NFP organisations can achieve good governance outcomes, particularly with ongoing guidance provided by the ACNC. CSA leaves the commentary on that to other bodies better placed to speak to those issues.

However, CSA does note that most NFP organisations could benefit from additional support in order to achieve better governance outcomes. CSA notes that ASIC currently provides extensive information to officeholders of companies concerning their responsibilities and obligations, including directing them to training and education programs to assist them to fulfil their duties. CSA is of the view that the ACNC can similarly provide links to training and education programs for responsible individuals in NFP entities, so that these individuals can easily access additional support.

CSA itself provides a NFP Governance Support Program, in which NFP organisations requiring governance advice and support may apply for pro bono assistance and, if approved, can be matched with an appropriately qualified CSA Member volunteer. This program is especially

relevant for smaller NFPs without the internal resources to adequately progress governance practices and processes.

30 How can we ensure that the standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?

CSA notes that one of the key aims of the NFP reform process is to reduce red tape for NFP entities. CSA certainly hopes that this aim will be achieved.

CSA notes that a principles-based approach, whereby the legislation contains high-level statements rather than prescriptive shopping lists of requirements, is more likely to achieve this aim.

CSA is of the view that light-touch compliance is best provided for by introducing a regulatory framework based on size and dominant purpose, with a short-form mandatory governance report that provides the essential information to those who interact with each NFP entity without imposing an onerous compliance burden on the NFP organisation. Standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC ensures that those in NFP organisations are not left to guess their duties or seek costly legal advice to clarify if they are compliant. Standardisation will also assist in overcoming the multiplicity of disclosures and registrations currently bedevilling the sector.

Standardisation should be supported by the publication of extensive guidance and fact sheets by the ACNC, with illustrative examples to assist in the education process. The ACNC should also issue model rules for a constitution and a 'ready-made' example of a constitution to assist all NFP entities to comply with their obligations.

CSA strongly recommends that the legislation be introduced with minimal requirements to allow for the NFP reform process to commence, with the ACNC granted the power to modify regulations. This will provide for the flexibility to respond to the needs of the sector as the reform process evolves, without forcing NFP entities to seek expensive legal advice or the government to seek amendments to the regulatory framework through the slow process of parliamentary approval.

A major risk to reduction in red tape is if the ACNC's rules and reporting are not adopted by other government agencies. If government agencies providing funding to NFP organisations require additional and alternative reporting from that required by the ACNC, NFP organisations will continue to be subject to more onerous compliance obligations than private sector organisations. The ACNC rules and reporting need to be adopted as the common model and recognised in regulation, operational guidelines, and contracts. Therefore, government agencies need to agree to the adoption of a uniform approach before the ACNC is operational. If this does not happen, any requirements developed by the ACNC will result in a greater administrative burden for charities regulated by the ACNC, which defeats the intent of the reform.

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

The principles that should be included in legislation are:

- duties of responsible individuals
- requirement for a constitution setting out the statement of objectives
- short-form governance report covering the financial position of the organisation; that the organisation is being managed prudently; that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution; who constitutes the governing body; and what processes are in place to ensure the personal interests of directors do not override the interests of the organisation
- requirement to hold a general meeting at least once a year

- where practical, responsible individuals of NFPs be subject to some form of election at, say, the general meeting of members.

The details should be included in the guidance material produced by the ACNC.

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

CSA leaves this to other bodies to comment on.

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?

See our comments earlier on the need for a mandatory short-form governance report.