

27 January 2012

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Dear Mr Leggett

[Consultation Paper – Review of not-for-profit governance arrangements](#)

PilchConnect appreciates the opportunity to respond to the *Consultation Paper – Review of not-for-profit governance arrangements* (the **Governance Paper**).

The free and low cost training, information and advice we provide is directed to supporting good governance in the NFP sector. We provide training on the legal duties of committee and board members to hundreds of people from the sector every year. Our training focuses on the key duties that apply despite the variations in the types of entity (unincorporated, incorporated association, cooperative, company limited by guarantee, local government hall management committees etc). It is delivered in the context of helping those who volunteer for small community groups understand key principles and standards of integrity. We do this because we believe improving the legal literacy of those involved in running NFPs is the first step to improved compliance and the adoption of good governance practices. (More information about PilchConnect is contained in Appendix A and see also the Guide that accompanies our training <http://www.pilch.org.au/govguide/>).

Given the nature of what we do, and why we do it, we are keenly interested in the issues raised in the Governance Paper. In our previous submissions we have also advocated for the establishment of an independent, one-stop-shop, specialist regulator.

In the context of our support for the promotion of good NFP governance and the establishment of the Australian Charities and Not-for-profits Commission (**ACNC**), we regret the need to express serious concerns about the timing, scope and content of the proposals set out in the Governance Paper.

In the course of preparing our submission we have provided feedback to University of Melbourne Law School's Not-for-Profit Project and collaborated with several NFP peak bodies (we have cross referenced some of their submissions). Unfortunately the very tight deadline combined with the time of year has meant that we have not been able to consult more broadly with others in the sector, or to seek formal endorsements of our submission. Despite being keenly interested in governance issues, the small groups we work with do not have the legal/policy expertise or resources to respond, especially to a submission-based consultation process.

It is worth noting that there is a strong alignment between our views, those expressed to us by others in the sector and those outlined in the Melbourne University submission.

### Overall comments

We have the following overarching concerns.

- ▶ The Governance Paper has created considerable concern and confusion because it does not articulate clearly what ‘high level principles-based requirements’ are and whether they:
  - will be subject to legislative enforcement and by whom; and
  - will be contained in voluntary codes of best practice and, if so, how they will be developed and what their status is in relation to existing codes and accreditation schemes.
- ▶ An understanding of the impact (including cost burden) of the transitional issues and, more importantly, how they will be addressed, is not clear in the Governance paper. Assurances that there will be ‘appropriate transitional provisions’ are not sufficient especially given any reforms contained in the ACNC legislation are due to commence on 1 July 2012.
- ▶ There has been considerable promotion of the National Compact between the Commonwealth Government and the NFP sector.<sup>1</sup> PILCH was on the taskforce that developed the core principles and we are a signatory to it and a champion of it within the sector. Development of high-level, NFP-specific governance requirements undertaken with broader sector and government consultation could be an example of the National Compact achieving tangible benefits for Commonwealth Government and the NFP sector – helping to counter claims that the Compact is just a series of platitudes.
- ▶ The Governance Paper confuses concepts of trust law and company law and the introduction of new terminology like ‘responsible individuals’, particularly at this stage of the NFP regulatory reform process, is unhelpful.
- ▶ Pursuing new governance provisions (including new reporting requirements) in the ACNC legislation for implementation as of 1 July 2012:
  - will erode support from the sector just as the ACNC opens its doors and most needs the patience and cooperation of the sector;
  - are likely to jeopardise negotiations with State and Territory governments to confer functions or even powers on the ACNC – these new ACNC provisions (not yet released) could conflict with the reforms for incorporated associations and cooperatives several have in progress;
  - will require additional funding for the ACNC because taking over these functions for companies limited by guarantee from ASIC (as the Governance Paper states ‘is envisaged’<sup>2</sup>) will be in addition to the functions which it has received a budget allocation for; and
  - risk increasing (rather than decreasing) red tape and the compliance burdens the NFPs face.

<sup>1</sup> See <http://www.nationalcompact.gov.au/> .

<sup>2</sup> See para 22, p 3

## Recommendation

**In view of our serious and fundamental concerns with the suggestions raised in the Governance Paper, we recommend that any changes to NFP governance arrangements be deferred.**

**Much more work is required before reforms should be introduced. Further consultation with both the sector and State and Territory governments is also needed. The aim should be for any agreed reforms (such as uniform core legislative duties) to be ready for commencement as part of a more cohesive package of changes on 1 July 2013.**

In the absence of agreement between the Commonwealth, States and Territories as to uniform, legislated core NFP governance requirements, the ACNC legislation should be limited to matters necessary for its establishment and to undertake its already announced roles (namely, establishing a publicly searchable register, assessing applications for charity, Public Benevolent Institution (**PBI**) and NFP status, reviewing and monitoring compliance with charitable objects in light of a new statutory definition of charity, and collecting and enforcing new annual reporting obligations).

Following its establishment on 1 July 2012, the ACNC will be in a position to support the work of The Treasury by facilitating wide consultation with the NFP sector and all Australian governments on:

- ▶ the appropriate form of governance requirements – legislative, voluntary code or guidance material; and
- ▶ the appropriate content of governance requirements – ideally to harmonise core director and committee member duties.

An appropriate timeframe for the introduction of any legislative changes and/or a sector-wide (necessarily high-level) voluntary code would be 1 July 2013. This would allow:

- ▶ a cohesive package of inter-related changes to be implemented at the one time – namely, the new annual (financial and activity) reporting, the statutory definition of charity, company limited by guarantee improvements and nationally consistent fundraising legislation; and
- ▶ time for government agencies within the Commonwealth Government to feel comfortable that the ACNC is the appropriate regulator for governance issues and knowledge transfer from the expertise that resides in the Australian Securities and Investments Commission (**ASIC**).

This last point is very important. With this level of comfort it is more likely that government agencies will not feel the need to ‘second guess’ (at least high level) NFP governance compliance by including detailed provisions in their procurement / grant agreements and accreditation and service standards.<sup>3</sup>

To highlight some of the points made above, the following is a hypothetical case study grounded in the types of issues we see in our case work.

<sup>3</sup> This will in turn support the work currently being undertaken by the Department of Finance and Deregulation. See <http://www.youtube.com/acnctaskforce>.

### Case study

Show You Care is a start-up NFP group. They plan to provide high quality 'show bags' to make life a bit easier for young people who are living rough – practical items like a shaver, phone card, public transport travel card, healthy snack foods, plastic 'poncho' raincoats etc. They hope to attract corporate, philanthropic and maybe even public donations of money and goods. While at the moment they are only a small local group of passionate people, they hope to expand and ultimately work across Australia. Between them they have considerable marketing and social media skills combined with good networks that could make this a reality.

In short, things unfold like this.

- They incorporate as an association in Victoria because it is cheap and there are model rules they can adopt without having to use a lawyer. They get an ABN on-line.
- They think they have a good chance of getting their first philanthropic grant but are told they have to be a 'DGR'. They research what this means and work out that they have to register with the new ACNC as a charity. The ACNC form also provides a seamless application to the Tax Office for DGR.
- It all gets sorted – they have all the boxes ticked – charity, PBI, DGR – and they apply for the grant and wait to hear.
- When they were registered by the ACNC they were given a link to information about 'governance requirements'. One of the most studious committee members reads everything – keen to do it 'right' especially now they are a registered charity. He realises these requirements are in addition to the Victorian incorporated association provisions which he made them all read when they were incorporated.
- He finds it confusing because the wording is similar but different on things like what is a 'conflict of interest' (one wording says he needs to worry about anything that is a 'pecuniary benefit or material advantage' the other says anything that is a 'material personal interest').
- There are also requirements about insurance but at this stage they haven't even got the grant so can't afford it.
- It talks about 'responsible individuals' – is this the same as 'committee members'?
- Good news, they get the grant – \$20,000 for one year. With this funding and their membership funds they decide to work in the Northern Territory as well as Victoria. Again, they are well informed and register as an 'Australian Registered Body' under the Corporations Act even though this means they have three regulators and three slightly different sets of governance obligations! Of course there are other laws to follow that vary between the two places like working with children checks and fundraising.
- A couple of years later they decide DGR is not of any real use to them. They can provide the 'show bags' entirely from in-kind donations and running costs are being covered by membership fees. They want to streamline the time they spend on administration and ask to take their name off the ACNC register. They find out this will mean they have to wind up their current entity!

## [More detailed comments](#)

### **Timing of the proposals**

As noted above, we are concerned at the short timeframe for consultation on an issue of great significance and application across the NFP sector. We note this concern is echoed by many – for example, the Australian Council of Social Services and FamilyCare. In our view, the current timetable is neither realistic nor desirable, and risks eroding current sector support for the ACNC.

While we appreciate the timing is being driven by the ACNC legislation, issues such as how a single governance regime might take into account the diversity of the sector are unable to be addressed by the sector in a one month, summer holiday turn around. If, as is suggested in the Governance Paper, consideration should be given to the development of new, NFP-specific governance principles, this timeframe is even less respectful of genuine sector input.

These concerns are compounded by the current absence of agreement across Australian Governments on key parts of the NFP regulatory framework (for example, fundraising). As highlighted by the case study, there is a real risk of burdening NFPs with more, and potentially contradictory, governance provisions, even if these are at the level of 'high-level' principles.

### **Transitional issues**

We support strongly the establishment of the ACNC as a one-stop-shop regulator for the NFP sector. In our view, the success of the ACNC's role as a one-stop-shop regulator will in a large part depend on reaching agreement with the States and Territories, as well as with existing Commonwealth regulators (ASIC and Office of the Regulator for Indigenous Corporations), to align legislative governance requirements and transfer enforcement powers to the ACNC. There is little detail in the Governance Paper about how and when this might occur.

Rather the Governance Paper acknowledges that there will inevitably be a period of duplication in the governance obligations to which many NFPs are subject during a transitional period.<sup>4</sup> We are concerned, however, that the Governance Paper glosses over the significance and likely duration of any duplication. The consequence of broadly applicable governance obligations set out in the ACNC legislation will be that incorporated associations and cooperatives will be required to comply with (at least) two different legal regimes and report to two different regulators (or three if they expand in the way described in our case study). While the requirements under the various regimes are likely to be broadly similar, there is a real possibility of conflicting standards in specific areas and potential for duplication of enforcement. This is highlighted in our case study in relation to the wording of conflict of interest provisions (that is, Victorian incorporated associations' wording compared with that in the Corporations Act).

At the very least there will be an increase in red tape and bureaucracy and decreasing clarity as to the legal obligations of those in positions of governance within NFPs. The final report of the scoping study on a national NFP regulator lists as one of the aims of NFP regulation

<sup>4</sup> See paragraph 23 of the Governance Paper.

providing 'NFP entities with certainty as to their rights and responsibilities'. We are concerned that the current proposals risk doing the opposite.

### **Deterring volunteer board members**

We are concerned that by making:

- ▶ the core governance duties more complex (for example, by introducing new the terminology of 'responsible individuals' which does not neatly overlap with 'directors' and 'committee members'); and
- ▶ their enforcement more fragmented by introducing an additional regulator (for example, ACNC and Consumer Affairs Victoria),

in a short time frame when there are several other significant changes occurring (for example, new occupational health and safety laws), volunteers will be deterred from taking on governance roles. This runs contrary to both the stated aims of the final report of the scoping study on a national NFP regulator and the recently released Federal Government National Volunteer Strategy.<sup>5</sup>

### **Existing governance provisions**

In our view there is no urgent need to include governance principles in the ACNC legislation. The core principles referred to in the Governance Paper already apply to all NFPs, either through the legislation applicable to their legal structure or by way of the fiduciary duties under common law. Even those on the committee of an unincorporated group can be personally liable under these principles.

In short, there is no lacuna in governance obligations. As the Melbourne University submission notes, the problem is not a lack of law in this area but rather a failure of enforcement (and possibly interest/resources) on the part of existing regulators.

The ACNC's powers to investigate charities combined with appropriate information sharing between regulators<sup>6</sup> should help improve this enforcement failure. If the ACNC is aware of a serious or continued governance failure in a charity that is an incorporated association it should, under its information sharing powers, notify the relevant State or Territory-based regulator for investigation particularly as very often it will be linked to a possible breach of State or Territory-based fundraising laws.

We are grateful to Mr David Tennant, Chief executive Officer, FamilyCare<sup>7</sup> for providing the following comment which highlights the multiplicity of overlapping governance requirements that already exist for many charities.

<sup>5</sup> See Focus area 3 in the National Volunteering Strategy.

<sup>6</sup> See PilchConnect submission on the ACNC Legislation dated 27 January 2012.

<sup>7</sup> FamilyCare is an NFP organisation offering welfare, carer and disability support services to families and to young people in Shepparton, Seymour, Cobram, Alexandra, Kinglake, Wallan and surrounding districts. They have been providing these services to people in the Goulburn Valley (regional Victoria) since 1984. See <http://www.familycare.net.au/>

### **Governance overload – a comment from the field**

“In addition to our ‘corporate’ regulatory requirements, we are operating under what, in the for-profit sector, are called quasi-regulatory layers: self and co-regulation. These include development of and compliance with self-regulatory codes and self-appraisal reports.

In the corporate sector a considerable amount of this activity has more to do with marketing than regulation – there is no genuine consequence for non-compliance, save for acts or omissions prohibited in legislation like the Corporations Act.

However, for NFPs, the quasi-regulatory layers below formal regulation (which currently depends on what type of entity you are) can be highly sophisticated, closely scrutinised and lead to very real consequences for non-compliance like funding being withheld or withdrawn. In other words, in a lot of cases what happens to keep NFPs to task is already a lot better and more reliable than what the corporate world does.

For example, this week we have had a two-day visit from external auditors reviewing FamilyCare’s compliance with the Victorian Standards for Disability Services – bear in mind this is only quite small part of our service. This two-day ‘validation’ visit added to an earlier two day (very detailed) desk audit in late 2011 and completes the current external review cycle against this standard. The current Standard 8 (Service Management) is described as ensuring the ‘management and governance practice is sound, accountable and consistent with the current disability support policy and practice’. Everything is considered, from the recruitment, induction and ongoing training of Board members, to financial oversight, strategic risk management and complaint handling.

If we didn’t meet acceptable practice against the standards, the ultimate outcome is the withdrawal of funding. This is just one standard and there are a number across other service areas as well as the Commonwealth programs having their own compliance and auditing regimes.

When the ACNC initial consultation documents talked about harmonisation and ‘report once/use often’ we thought it signalled a longer term intention to do what Victoria’s Department of Human Services is trying with its ‘One DHS’ policy approach. That’d be a great thing. But the Treasury governance paper doesn’t even acknowledge the existence of these other frameworks, let alone that they might already be dealing with the issues, better and deeper than the ACNC would be able to.

Instead of reducing reporting red-tape, pursuing the course described in the governance paper would just add to it without any clarity or impetus for effective transitional arrangements.”

*Mr David Tennant, Chief Executive Officer, FamilyCare, Shepparton, Victoria, Victoria*

## Detailed scope of the proposals

While the introduction to the Governance Paper refers to 'high level core governance principles', the detail covers a range of very specific obligations including:

- ▶ disclosure of internal governance policies and remuneration;
- ▶ risk management procedures;
- ▶ insurance coverage;
- ▶ the minimum requirements for governing rules; and
- ▶ relationships with members.

While these obligations may be aspects of 'good governance', we consider that they should not be prescribed in legislation. They are likely to lead to 'tick the box' compliance - which is time consuming and potentially costly (for example, obtaining insurance that is not warranted for very low risk activities), but rarely effective at preventing serious mismanagement (and certainly not fraud). We refer to the comments made on this issue in the Melbourne University submission.

Good governance is not guaranteed by adding more and more requirements to prescriptive legislative governance obligations. To highlight this point we refer to a recent example reported in the media, '*Easy dough from non-profit to \$50m*' (The Australian Financial Review, Thursday, 10 November 2011, p1). The company referred to in the article, BRI Australia was a company limited by guarantee that changed its legal form to proprietary (for-profit) company as currently allowed by the *Corporations Act 2001* (Cth). As outlined in our submission on the ACNC legislation, this issue would be better addressed in the upcoming review of the company limited by guarantee provisions of the *Corporations Act* (for example, by requiring the consent of the ACNC before a company limited by guarantee can convert to a proprietary limited company) rather than by the introduction of new governance provisions.

## New terminology

We are concerned that the Governance Paper appears to favour the introduction of a new term of 'responsible individuals', to cover those people in the organisation who will be required to comply with the governance obligations. We are not convinced of the need for a new term and believe it is likely to confuse those already involved in the governance of charities (and other NFPs) as well as prospective volunteer board and committee members.

We note and endorse the following comments on this issue from the Melbourne University submission:

The language in relation to conflict of interest in associations legislation also differs substantively from that under the *Corporations Act*. Finally, trustees remain subject to higher duties that are not readily amenable to 'core' principles.

One solution may be to state in the legislation the general law duties applicable to all responsible individuals, followed by a statement that the general law imposes additional duties upon trustees. This might be followed by a statement setting out the statutory duties applicable to different entities. This would clarify the nature of the duties owed and provide the 'core' rules suggested by the [Governance] Paper, while not changing the substantive law and respecting existing legislation.

The tenor of the [Governance] Paper suggests, however, that the governance provisions should include greater detail than these general duties. It seems to suggest, for example, that the legislation should specify whom the responsible individuals should consider in exercising their duties, and different standards of care for different categories of people. We note that the general duties allow a holistic



consideration of the standard of a 'reasonable' person in that position, and consider that this flexibility should be retained rather than vainly attempting to prescribe the content of such duties in advance. <sup>8</sup>

### **Role of education and training**

Finally, we consider the desire to improve governance in the NFP sector needs to recognise that 'good' governance is more likely if core, minimum legislative standards are supported by education, guidance and training. Our experience is that most instances of poor governance (in particular, in small-medium volunteer-run NFPs) results from a lack of understanding of legislative requirements and inexperience, rather than deliberate fraud or misconduct.

We note that a great deal of excellent guidance material already exists, such as the materials produced by the Australian Centre for Philanthropy and Nonprofit Studies (Queensland University of Technology)<sup>9</sup> and the highly regarded Australian Council for International Development Code of Conduct.<sup>10</sup>

The development and provision of best-practice guidance materials and/or codes of conduct developed in collaboration with the sector, is the approach taken in other jurisdictions and more likely to gain traction. In this respect we refer to the current research on good governance in the Melbourne University's submission.

### **Responses to specific questions in the Governance Paper**

We provide the following responses to flesh out the overall comments points made above.

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

Note our concerns with the use of the term 'responsible individuals' above.

The duties of those people on the governing body of a NFP (the duties owed by 'responsible individuals') are always owed to the NFP itself as a separate legal entity. As noted earlier in our submission, the core governance principles are based on common law fiduciary duties which, at their simplest, require the person who stands in the position of fiduciary to act in good faith and in the interests of the other party (the NFP) rather than their own interests (or the interests of others such as a particular group of members). While in any NFP there will be a wide range of stakeholders (such as donors, members, volunteers, clients, funders, the public) with an interest in the operations and good governance of a NFP, it is misleading to speak in terms of 'duties' being owed to them.

#### **2. Who do the responsible individuals of NFPs need to consider when exercising their duties?**

As noted above, there may be a wide range of stakeholders with an interest in the running of a NFP. We consider that it is unhelpful and overly prescriptive to specify in legislation who 'responsible individuals' should be required to consider when exercising their duties. The duties are owed to the entity itself and its mission; in effect any obligation to *consider* other stakeholders is satisfied if the responsible individuals fulfil their duty to the NFP in terms of carrying out its mission.

<sup>8</sup> See Melbourne University Submission pp 11- 12

<sup>9</sup> For example, their 'developing your Board' resources <https://wiki.qut.edu.au/display/CPNS/DYB+Home>

<sup>10</sup> ACIFID Code of Conduct <http://www.acfid.asn.au/code-of-conduct>

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

We recommend deferring inclusion of governance principles in the legislation establishing the ACNC in favour of further consultation with the sector. However, if core duties are to be included these should be based on well-established existing fiduciary duties. The description of these duties should follow the directors duties set out in the *Corporations Act*. The only helpful addition might be to state in a definition provision (or the Explanatory Memorandum / ACNC guidance material) that the duty of responsible individuals need to act for a 'proper purpose' includes an obligation to pursue the objects set out in the entity's constitution

Given the substantial body of case law and commentary interpreting these duties, we consider that it would be confusing and counter-productive to try to rewrite these duties. Even small variations from existing wording could result in expensive and time-consuming litigation. Until there is agreement (and legislation) in place transferring ASIC's existing role in relation to charities incorporated as companies to the ACNC, this seems a pointless and potentially confusing exercise. (Note: this would include transferring regulatory functions not only over companies limited by guarantee but also over some propriety limited companies).

Any other obligations of 'responsible individuals' are more appropriately dealt with by way of guidance materials produced by the ACNC and/or by supporting existing codes of conduct and best practice.

**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?**

We do not consider that a minimum standard of care should be prescribed in ACNC legislation, or at least not until there is agreement for a nationally consistent approach across the most common NFP entity types. The existing common law duties, company and associations obligations rely on the standard of a 'reasonable person' in assessing compliance, which allows for the circumstances of the individual case – such as the size, nature and operations of the entity and any special skills or knowledge of the person – to be taken into account. Given the diversity of NFP entities we consider that this flexible standard is appropriate.

For similar reasons there should not be different standards for paid employees compared with volunteers, professionals or lay people. It is common for the majority of the governing body to be volunteers with perhaps one (part-time) paid staff member. It would be unfair and inappropriate to have a higher standard apply to the paid staff than the volunteer directors.

**5. Should responsible individuals be required to hold particular qualifications or have particular experience or skills**

No. There is no reason to apply a higher standard on NFPs than applies to the directors of for-profit (business) entities.

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

No. It is appropriate that the core duties apply to all those on the governing body – to all committee or board members and trustees. It may be necessary to express separate (additional) duties for charitable trusts. As outlined earlier the definition of 'responsible individual' is confusing.

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

As previously noted, and highlighted by our case study, without agreement with the States and Territories there is a real risk of duplicated provisions and potentially overlapping enforcement.

**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. We can see no good reason why volunteers who are not responsible individuals should have additional requirements imposed on them. As mentioned previously, this could deter volunteers and would be counter to other Government policies seeking to grow volunteering (see National Volunteering Strategy).

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

No. As outlined above the existing standard is flexible enough to take into account differences in the risk posed by particular cases. It is important to note that many 'higher risk' NFP sub-sectors, such as child, disability and aged care, are also extensively regulated under specific accreditation processes that are monitored and enforced by specific government agencies (this is highlighted in the comments we have included from FamilyCare earlier in our submission).

General guidance on appropriate risk management strategies could be part of the information and education functions of the ACNC.

**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?**

See above. The Corporations Act has the benefit of an established body of case law supporting it. There have been and are moves for more of the duties and defences from the Corporations Law to be included in reforms to the various State and Territory incorporated association regimes (for example, a duty to prevent insolvent trading is now contained in several jurisdictions. Also note the reforms currently before the Victorian Parliament.

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

Our submissions have consistently called for tiered reporting obligations based on size.

The Exposure Draft of the ACNC Bill requires a copy of the internal governance rules to be included on the register. We support this requirement but do not consider there is any need for any further disclosure. We are opposed to legislation mandating 'tick the box' reporting – for example, 'Do you have a risk management policy?'

This is an issue more appropriately dealt with as part of the ACNC's Discussion Paper and associated community consultations.

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

Generally we consider that there should not be a requirement to disclose the remuneration of responsible individuals beyond the information contained in the financial statements in the annual report (which will be tiered so necessarily provide more information in relation to larger organisations). This together with the information as to the activities of the organisation should provide sufficient information.

We agree with the comments made in the Melbourne University submission on this question.

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

In our governance training we always discuss the duty to avoid conflicts of interest in detail and provide hypothetical scenarios for discussion. We encourage groups to:

- adopt and actively implement a clear conflict of interest policy; and
- for the culture of committee/board meetings to be one that encourages people to disclose potential conflicts at the earliest possible stage and then follow their policy to ensure the potential conflict is managed appropriately (ie, by that person not taking part in the discussions and not voting).

A clear policy that is consistent with legislative duties should be encouraged as a matter of good practice by the ACNC, but not imposed by legislation.

**14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?**

The CATSI legislation deals specifically with this issue in the context of native title groups.

**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'?**

See above. We prefer the *Corporations Act* wording of 'material personal interest'.

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

Again, we do not consider that risk management requirements should be prescribed in legislation.

The question implies that all NFPs 'control funds from the public' – this is not the case. The vast majority rely solely on income generated from their own members.

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

Again, not this in not appropriate for legislation. A range of policies that are consistent with the range of legislative duties (for example, sexual harassment, equal opportunity, occupational health & safety etc) should be encouraged as a matter of good practice by the ACNC, but not imposed by legislation.

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

Again this is not a matter for legislation. It may be good practice for NFPs but should be considered by each NFP according to its own circumstances. See above.

We agree with the comments made in the Melbourne University submission on this question.

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

No, as above, it should be a matter for each person to consider in light of their circumstances – for example, are they on the committee of a small membership based group that meets to discuss policy issues or one that runs camps for young children? Are they on more than one NFP / business board and want insurance to cover all their appointments?

If this was introduced as a requirement, would a failure to obtain (and retain) the insurance constitute a breach of the Act?

Many NFPs tell us that insurance can be expensive unless they can access some of the schemes provided via government funding (for example <http://www.vmia.vic.gov.au/>).

We also agree with the observation made in the Melbourne University submission on this question that: 'insurance ... may be unnecessary, and give misleading comfort to responsible individuals'.

In contrast, the reforms to the incorporated associations Act currently before the Victoria Parliament will provide that committee members must be indemnified by the organisation.

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

Internal review processes can be an important part of good governance but, again, this is a matter that needs to be tailored to the particular group. There are already certain rules mandated for those organisations with members – for example, companies and incorporated associations and cooperatives.

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

We agree with the comments made in the Melbourne University submission on this question:

Given that these legislative requirements have been developed specifically for these entities [incorporated associations, CATSI Act bodies], and will continue to exist upon commencement, we see no reason to identify a 'core' list common to both of these entities. We also note that such requirements cannot apply to trusts. Rather, if it is thought necessary, the issue should be considered in the context of the foreshadowed review of legislation governing companies limited by guarantee.

**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?**

There are already requirements in the legislation applying to particular entities about the matters which must be included in an organisation's rules. The incorporated associations legislation in each State and Territory also has model rules which may be adopted if appropriate.

If functions in relation to particular entity types are transferred to the ACNC in the future, then this might be time to consider this issue.

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

Enforcement of rules of an particular entity type are set out in their related legislation. Until there is an agreement between all Australian governments, the ACNC should refer these matters to the relevant entity regulator. The ACNC would need more resources if it was to do otherwise.

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

See above.

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

The Corporations Act should provide a model constitution for companies limited by guarantee in the same way that model rules are provided under incorporated association regimes. The model rules should be the default provisions but not compulsory.

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

None. The legislation for the various entity types already prescribe rules relating to members in some detail. Additional rules are not necessary and would create confusion.

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

No, not appropriate

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

All entities should be required to hold an annual general meeting (in person or via written resolution of the members). It is reasonable to require them to confirm this has been held as part of their annual reporting obligations to the ACNC. The requirement to hold the meeting is already provided in existing entity legislation.

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

Peak bodies and other sector-based intermediary services are best placed to assist with more specific governance issues – for example, help with governance issues specific to running a kindergarten is often best handled by the peak body, Kindergarten Parents' Victoria.

**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?**

We are concerned that, rather than any *reduction* in red tape, what has been canvassed will *increase* red tape. Meaningful reductions in red tape will only occur when there is cooperation across all Australian governments to harmonise the core duties and reporting requirements. Further reductions will occur when reporting is made to the ACNC as a 'one-stop-shop' regulator and when government agencies and funders rely on the information as lodged.

The comments from FamilyCare (see earlier in this submission) highlight the other issue of red tape associated with overlapping, quasi-regulation.

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

See above – our starting point is that guidance materials combined with training and support services are the best approach. It is the enforcement of existing duties rather than the introduction of new legislative provisions that is required.

## **Conclusion**

**In conclusion we urge The Treasury to defer any changes to NFP governance arrangements.**

**Much more work is required before reforms should be introduced. Further consultation with both the sector and State and Territory governments is also needed. The aim should be for any agreed reforms (such as uniform core legislative duties) to be ready for commencement as part of a more cohesive package of changes on 1 July 2013.**

We would be happy to elaborate on any of the issues raised in this letter. Our contact details are below.

Yours sincerely,

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## Appendix A - About PILCH and PilchConnect

The Public Interest Law Clearing House (Vic) Inc. (PILCH) is a leading Victorian, not-for-profit organisation. We are committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

PilchConnect is PILCH's specialist service that provides NFPs with access to free or low cost, high quality, practical and plain language legal help (information, advice and training). We understand our NFP clients are time poor, often working in a volunteer, 'out of hours' capacity. We help those NFPs that cannot afford (or otherwise access) private legal advice and prioritise those in rural and regional areas.

We support small-medium NFP community organisations to be better run. We do this because well-run NFPs are more likely to achieve their mission, and because public trust and confidence in the NFP sector is likely to be improved. By supporting NFPs in this way, we aim to contribute to a better civil society and more connected communities.

Our experience has confirmed that, with support at key points during their organisation's lifecycle, those involved in running NFPs can be empowered to handle common legal and legally related issues themselves (for example, incorporation, changing their rules). Our integrated service model helps NFPs navigate the complex regulatory maze – both their general legal obligations and NFP-specific issues such as charitable fundraising.

We believe improving the legal literacy of NFPs and their advisers is the first step to improved compliance and the adoption of good governance practices. Our help supports NFPs to be run more effectively, efficiently and sustainably – we 'help the helpers' preserve their limited resources for delivering their mission, such as services or advocacy for those experiencing disadvantage. A strong, well governed NFP sector will enjoy increased public trust and confidence and, with that essential backing, the sector will be able to sustain and even grow its vital contribution to the well-being of all Australians.

We fill a niche role, sitting between regulators and the private legal profession. If those involved in running an NFP are not sure about how to comply (or realise they have not complied), they will seek advice from us but would be concerned about approaching a regulator. As an independent, sector-based intermediary they know we will understand the practical constraints they operate under. We often help them work out if they really do have a legal problem, how serious it is and what are the possible next steps.

To address systemic issues, we undertake campaign work. This is directed to achieving a smarter legal framework for NFPs, and reducing red tape. Our client work provides a rich evidence base to explain the practical implications of existing laws (and the often unintended consequences of proposed laws) on small, volunteer-run NFPs. To influence a shift in norms and, in turn, bring about policy and law reform in the areas that will achieve the greatest benefit for small-medium NFPs, we recognise the importance of having strong organisational capacity, alliances and support base.