

Catholic Health Australia

**Review of governance arrangements:
Response to Treasury Consultation**

January 2012

Table of contents

Summary: New governance rules are not needed.....	3
1. Centralisation of governance requirements	4
2. Application of uniform governance principles.....	5
3. An alternative approach to the imposition of new rules.....	6

About Catholic Health Australia

21 public hospitals, 54 private hospitals, and 550 aged care facilities are operated by different bodies of the Catholic Church within Australia. These health and aged care services are operated in fulfilment of the mission of the Church to provide care and healing to all those who seek it. Catholic Health Australia is the member organisation of these health and aged care services. Further detail on Catholic Health Australia can be obtained at www.cha.org.au.

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Summary: New governance rules are not needed

The Catholic Health Australia (CHA) network of not-for-profit public hospitals, private hospitals, residential aged care services, community aged care services and home nursing services do not oppose Government intentions to enhance the governance capacity of the not-for-profit sector. However, we see little evidence that the proposals canvassed in the Treasury consultation paper on the review of not-for-profit governance arrangements will likely benefit either the governance or service delivery of health and aged care services.

The Treasury consultation paper makes no clear argument as to what problem currently exists in relation to not-for-profit governance that warrants the development of new governance arrangements. In the absence of a clear identification of a problem requiring a solution, CHA is unsure as to why governance rule changes are being proposed for the not-for-profit sector as part of the establishment of the new Australian Charities and Not-for-Profits Commission.

As an alternative to the changed governance requirements as foreshadowed in the Treasury consultation paper, CHA recommends that the new ACNC be instead empowered to focus its work on governance education and best practice attainment. The approach detailed in the Treasury consultation paper is one likely to lead to creation of new rules that entities will be required to comply with. Instead, energy might be better directed to improving the governance capacity of the not-for-profit sector, and leaving in place the current rules and structures within which entities are governed. Enabling the development of the governance capacity of the not-for-profit sector may yield greater social dividends than a structural reorganisation of existing governance arrangements.

Specifically in relation to not-for-profit health and aged care services, we submit they are currently governed by sophisticated and detailed mechanisms and that the Treasury consultation paper puts forward no clear rationale as to why these sophisticated and detailed mechanisms require alteration. Because not-for-profit health and aged care

services are governed in complex ways, any change in governance requirements would involve organisations having to review and likely alter their governance practices. For such action to occur, a clear benefit to service consumers, service funders and service owners should be able to be demonstrated. The Treasury consultation paper does not point to such a benefit.

The not-for-profit health and aged care sector is highly regulated. Hospitals and aged care services are required to be licensed, accredited and monitored by a mixture of State and Territory bodies. Licensing, accreditation and performance monitoring is overseen by complex governance structures that currently meet expectations of service consumers, service funders, and service owners alike. The Treasury consultation paper, whilst promoting a need for new accountability and transparency at paragraph 1, does not adequately recognise these existing regulatory requirements that already achieve high levels of accountability and transparency. The Treasury consultation paper is mostly silent on the existing benefits of such regulation, and their well entrenched ties to existing governance structures.

We do not agree that the proposed changes to current governance arrangements will likely reduce 'red tape.' Rather, they appear likely to either duplicate or simply shift accountability for oversight of not-for-profit companies limited by guarantee from one part of government to another. The Treasury consultation paper does not indicate where any reduction in 'red tape' is likely to occur.

In response to specific propositions detailed in the Treasury discussion paper, we argue that:

1. Centralisation of all governance requirements for not-for-profit entities within the ACNC as proposed at discussion paper paragraph 5 may require the ACNC to develop expert capability in areas of service specialty that has not been envisaged in the design of the ACNC, despite recognition at discussion paper paragraph 13.4 that

regulation of “service provision” would remain with existing government agencies.

2. The replacement of governance requirements of the *Corporations Act* with new uniform rules as envisaged by discussion paper paragraph 21 risks creation of legal uncertainty. Health and aged care organisations, together with many other not-for-profit entities, are already well governed using a variety of different structures and approaches. The options proposed in the discussion paper appear unlikely to do anything to enhance these governance arrangements, and the proposal of the Treasury consultation paper paragraph 21 to standardise and impose uniform requirements may unreasonably disrupt governance of some not-for-profit entities.

These matters are discussed in some detail in the body of this submission. CHA’s support for revised governance arrangements for not-for-profit organisations is dependent on any change to governance requirements satisfactorily addressing these elements and:

- The Council of Australian Governments agreeing that all States and Territories will adopt a common approach to governance of not-for-profit entities as foreshadowed in discussion paper paragraphs 22 and 23, such that there be national consistency in governance of not-for-profit bodies; and that
- An undertaking be given by the Australian Government to ensure that reporting and compliance with the proposed governance arrangements create no unreasonable administrative cost burden on charitable organisations.

In providing this submission, we endorse the submission of the Australian Catholic Bishops

Conference, a submission that CHA has contributed to in part.

1. Centralisation of governance requirements

The consultation paper proposes at paragraphs 21, 22 and 23 new uniform governance requirements for registered entities, with the new national regulator to monitor and administer all governance requirements regardless of entity structure. To achieve such an outcome, the consultation paper notes agreement of States and Territories would be required. The consultation paper does not consider if management of governance standards currently required by other Commonwealth Government departments would or should also be transferred to the new regulator as part of the proposal to have it monitor and administer all governance requirements of registered entities.

Leaving the difficulty of securing State and Territory agreement for the proposed national regulator to oversee governance of entities established under State or Territory law to one side, there exist a range of Commonwealth Government requirements for the practice of good governance within not-for-profit bodies delivering Commonwealth-funded programs. Several different Commonwealth Government departments outline requirements for governance practice where a not-for-profit entity delivers a Commonwealth-funded program. Similarly, different Commonwealth Government departments have in place monitoring and investigation processes to ensure compliance with these expectations. These governance standards and the monitoring and investigation powers Government departments have in overseeing these standards often operate in relation to both not-for-profit and for-profit entities.

Illustrations of the types of Commonwealth governance requirements operative within the CHA network include:

- Residential Aged Care Services, which must comply with the Aged Care Accommodation Bond Governance Standard as required by Section 23.38A of the *User Rights Principles*

1997 as authorised by the *Aged Care Act 1997* and overseen by the Office of Aged Care Quality and Compliance. The standard requires a particular approach to investment of residents' bonds that are paid to enable capital investment for aged care infrastructure.

- Disability Service providers, who must comply with the 12 Disability Service Standards that are issued by the Department of Families, Housing, Community Services and Indigenous Affairs. The Department oversees the accreditation of funded agencies in part by assessing the effectiveness of governance structures in ensuring compliance with these 12 standards.

These illustrations point to existing governance requirements of Commonwealth Departments that presumably are being considered for centralisation in the new national regulator. Such centralisation would appear to be necessary if the ACNC is to achieve its purpose of being the sole Commonwealth body with responsibility for not-for-profit governance. The consultation paper at paragraph 13.4 states service provision regulation would remain the responsibility of existing government agencies, but the illustrations of aged care and disability care governance appear to be beyond the intention of paragraph 13.4.

There is no evidence to suggest the new national regulator would be either sufficiently skilled or resourced to oversee specific aged care or disability care governance requirements. It may in fact be detrimental to attempt to place within the new national regulator specific functions in relation to aged care and disability care governance. Placing such functions within the new national regulator would also be unusual in circumstances where Government departments would need to retain their existing responsibilities in relation to for-profit service providers when similar responsibility for not-for-profit service providers had been placed in the new national regulator.

The consultation paper's failure to explore and address the challenges of centralising all Commonwealth Government governance requirements for not-for-profit entities in a single national regulator reinforces the difficulty of seeking to apply a single governance solution to what is a diverse not-for-profit sector with multiple interactions with the Commonwealth.

2. Application of uniform governance principles

Treasury discussion paper paragraph 21 states governance requirements of the *Corporations Act* will be replaced as they relate to companies limited by guarantee. The discussion paper offers no rationale as to why the governance requirements of the *Corporations Act* are deficient such that they require replacement in relation to the operation of not-for-profit entities.

A majority of the entities that govern Catholic health and aged care services are companies limited by guarantee. Directors exercising governance authority over these companies hold no major current concerns with the operation of either the *Corporations Act* or the Australian Securities and Investments Commission. A body of common law has been developed over a number of years that has clarified governance powers and requirements, and directors with responsibility for Catholic health and aged care organisations have built both skills and complex systems in response to this current statutory and common law framework. Replacing this current framework without a clear understanding as to why such action is necessary risks the creation of legal uncertainty, and will require large numbers of people and entities to experience different degrees of disruption as they adjust to new arrangements.

Treasury discussion paper paragraph 37 also raises the proposal that the governance principles that will replace those currently articulated in the *Corporations Act* should also be applied to all not-for-profit entities registered with the ACNC, regardless of their legal form. The discussion paper makes no compelling argument as to why uniform governance is either required, possible or would likely be beneficial.

Within the CHA network, the majority of entities are companies limited by guarantee. A small number are ultimately governed by trusts, and an even smaller number are associations established by State or Territories. The presence of these different legal forms appears to cause consumers, funders and owners no current detriment. Yet asking one or more of these three legal forms to be altered to comply with new uniform governance requirements would impose (an initial) burden on an entity in circumstances where the reason to do so is not clear.

3. An alternative approach to the imposition of new rules

The *Exposure Draft Australian Charities and Not-for-Profits Commission Bill 2012* states at Division 2 that its object is to “*promote*” public trust and good governance. We argue that as an alternative to changing current governance arrangements, the Commonwealth should instead *promote* best-practice governance through resourcing the ACNC to lead initiatives that strengthen the governance capacity of not-for-profit entities.

As we have argued in this submission, many entities within the not-for-profit sector are already well governed to the satisfaction of their consumers, funders and owners. Where good governance exists, neither governance change nor best practice promotion is required. Other entities, either because they have come to the attention of existing regulators or through their own self-identification, could be given access through the ACNC to specific tools, programs, services and grant funding in order to lift the governance capacity of their not-for-profit entity.

In designing a program of governance *promotion*, the ACNC should consider working with not-for-profit bodies to agree:

- Best practice core competencies for directors or governors of not-for-profit bodies;

- Education programs for directors on not-for-profit governance that recognise the role played by existing education providers of such services;
- A template board charter for adoption by not-for-profit boards of governance.