



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

15 February 2013

The Manager
Philanthropy and Exemptions Unit
Indirect, Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600
NFPreform@treasury.gov.au

Dear Sir/Madam

Development of Governance Standards Consultation Paper

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

The Church has a number of comments on the Governance Standards Consultation Paper (the Consultation Paper).

General Comments

Given the serious consequences for non-compliance, the standards need to be capable of clear understanding and application. As currently drafted, they appear to be rooted in the corporation model of governance (ie. an entity has members and directors) which may cause difficulties for affected religious entities that are not basic religious charities (BRCs).

The language and terminology used by the regulator, by its staff and the construction of forms is also of a corporate nature and is not easily adapted by those who operate within unincorporated governance structures. This is evident when registering new entities through the Australian Charities and Not-for-profits Commission (ACNC) where requirements in the legislation have not been adapted to or do not reflect existing Church governance structures. The structure of the Catholic Church varies across the country, including in significant not-for-profit sectors such as education and health.

The Catholic Church wishes to work closely with the ACNC to enable the ACNC to develop expertise in this area. Established experts and liaison officers within the ACNC would then be able to deal with the specialisation and complexity of Church governance structures. The well-established governance structures and operations within New South Wales for example are significantly different to those that operate within Victoria. Understandably a 'one-size-fits-all' approach should not apply and the requirements including educational materials need to be relevant and engaging for unincorporated entities. Educational materials and guidance will need to be tailored so they are suitable for use by the various forms of unincorporated Church entities that are registered charities.

Standard 1 – Purposes and NFP nature of a registered entity

Affected religious entities (ie. non-BRCs) may not have a conventional constitution or documentation and the ACNC should acknowledge this point in explanatory material so its officers do not misapply the law to religious entities. There is also a need for the ACNC to develop expertise about current complex governance structures that already operate within the Catholic Church and other Churches and to have an understanding of differences across the country.

Standard 2 – Accountability to Members

As the Consultation Paper acknowledges at page 11, the governing rules of Church bodies may be included in Church law. Church law generally contains provisions for accountability and for the appointment of responsible entities, some of which will be registering with the ACNC. These provisions of Church law are accepted within the Church but may differ in some respects from standard 2(2).

Some Church bodies may be considered to have members and some of those may not qualify as BRCs and therefore may be subject to compliance with the governance standards.

We are aware that there are also many non-Church registered charities that have governing rules which include particular arrangements for accountability to members and for the appointment or election of responsible entities. These rules may also differ in some respects from standard 2(2) and the notes.

In our view draft standard 2 should be amended to take account of this circumstance.

In that context, we request the following amendments be considered to paragraph 2(2):

The standard should be made "Subject to the provisions of a registered entity's governing documents ...".

Note 1 should be amended by deleting “providing for elections for its responsible entities” and inserting instead “providing for elections or appointments for its responsible entities in accordance with its governing rules”.

The following should be added at the beginning of note 2: “Responsible entities should be guided by their governing rules in determining what, if any, steps are appropriate.”

Also, the “membership” of a religious entity may be open to misinterpretation in the absence of clarification. In this regard, it does not follow that all adherents (or claimed adherents) to a religion necessarily will be members of a religious entity advancing a particular mission of that religion. To provide clarification and certainty and to prevent the potential for a member of the public claiming membership of a religious entity based on a tenuous connection, “member” should be defined as a person who has paid a financial subscription for membership of the entity or who is recorded as a member on a register of members.

Standard 3 – Compliance with Australian laws

The ACBC is concerned this standard would mean charities working outside Australia would have to comply with all Australian laws in their overseas operations, despite conditions overseas being often substantially different to Australia. For example, agencies operating in disaster areas will likely not be able to comply with Australian health and safety laws.

This standard should also only apply when an entity has been convicted of an offence or been made subject to a civil penalty by the appropriate authority, to mitigate the potential for conflicting views between the ACNC and the appropriate authority.

Standard 4 – Responsible management of financial affairs

This standard is not specific enough and so is likely to lead to disagreement over its application. A better approach would be a more prescriptive test of solvency, such as not incurring debts unless there is a capacity to pay, or that an entity must have policies on who is authorised to deal with money such as responsible persons and appropriate delegates.

The ACBC supports Catholic Health Australia’s submission that the standard should be drafted to require the entity to have a “procedure” for financial management.

Standard 5 – Suitability of Responsible Entities

There is significant emphasis on this standard primarily because of its length over more than a page. We recommend that it could be more succinctly expressed combining subsections (2) & (3) in the following terms:

“(2) The registered entity must take reasonable steps to ensure that each of its responsible entities are not:

- (a) disqualified from managing a corporation within the meaning of the *Corporations Act 2001*; or

- (b) disqualified from managing an incorporated association within the meaning of that association's enabling Act; or
- (c) guilty of fraud, negligence or breach of trust under the common law."

Subsection 3 and 4 should be deleted.

The ACBC queries whether under subsection 4 the regulations can authorize the Commissioner to disqualify a responsible person from acting for any and all entities when the parent legislation contains more restrictive powers on disqualification.

Standard 6 – Duties of Responsible Entities

Paragraph (3) deals with perceived or actual material conflict of interest. In broad terms we consider that it is acceptable. However, paragraph (3)(c) provides that a registered entity that is a company is required to disclose such a conflict of interest to the entity's members.

A strict reading of the operative wording of paragraph (3)(c) (excluding the note) would require disclosure of such a conflict to members wherever the registered entity is a "company", without qualification.

As a consequence of the broad definition of "company" under the *Australian Charities and Not For Profit Commissions Act 2012 (Cwth)*, this standard would apply to all bodies corporate, unincorporated associations and bodies of persons (excluding partnerships). In practical reality, this covers almost all registered entities (except basic religious charities).

This requirement is partially qualified in note 2. However note 2 is not exhaustive of circumstances where disclosure to members is required. Greater certainty is needed.

It is our view that the contents of note 2 are substantive (not just informative) and should be included in the wording of the actual operative standard rather than as a note, notwithstanding the provisions of section 13 of the *Acts Interpretation Act 1901 (Cwth)*. In addition, the standard should be exhaustive of circumstances where disclosure to members is required.

We request that this standard be amended to read:

"If the registered entity is a company and where there is only one director or all directors have a similar material conflict of interest - to the members of the registered entity".

One practical consequence of this standard is an entity may need to conduct induction and training for responsible persons and possibly obtain annual statements from their responsible persons on their compliance or keep other records to substantiate compliance year to year. The impact on costs and resources will increase, as will the demands made on volunteers' time.

I would be happy to answer any questions you may have and would also welcome the opportunity to amplify the several major concerns we have expressed.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Rev Brian Lucas'. The signature is written in a cursive style with a large initial 'R' and 'L'.

Rev Brian Lucas
General Secretary