



Anglican Church Diocese of Sydney

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Submission to Treasury regarding the Exposure Draft for Public Ancillary Funds

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Who we are

- (a) The name of our organisation is the Anglican Church Diocese of Sydney (**Diocese**).
- (b) This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod. The Synod is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902 (NSW)*¹. The Diocese is the oldest and largest of the 23 Anglican dioceses which together form the Anglican Church of Australia.
- (c) The Diocese, through its various component bodies and through its congregational life is a provider of a wide range of programs including in social welfare, education, health and aged care, youth work, and for the homeless.
- (d) The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917 (NSW)* and the *Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)*. These bodies, together with the diocesan network of 267 parishes, are accountable to the members of the Church through the Synod of the Diocese².
- (e) In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as

¹ The Synod has 719 members, the majority of which are appointed or elected representatives from our 267 parishes.

² In the last ABS Census 837,917 people in the Sydney region identified as being Anglican. The regular combined membership of our parishes is about 80,000 people.

Anglicare³ and Anglican Retirement Villages⁴, as well as other charitable institutions including Anglican Youthworks⁵, and 40 Diocesan schools⁶.

- (f) We appreciate the opportunity to make submissions in response to the matters raised in the Exposure Draft and its accompanying explanatory memorandum.
- (g) Our contact details are –

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2 Our interest in this matter

- (a) Many parishes within the Diocese operate a number of tax deductible funds, such as a school building fund, necessitous circumstances fund, registered cultural organisation and / or religious instruction in government schools fund (**DGR Funds**). In order to simplify fundraising and accounting processes, a considerable number of parishes have established a public ancillary fund to facilitate the receipt of donations from parishioners by one fund issuing one tax deductible receipt. The parish then implements the donors' instructions and makes distributions as directed to the relevant DGR Fund(s).
- (b) In some cases, public ancillary funds operated by parishes are used to provide a means for parishioners to donate to other institutions that are endorsed DGRs, such as Anglicare and the Archbishop of Sydney's Overseas Relief and Aid Fund.
- (c) Consequently, public ancillary funds operated by parishes do not exist for the purpose of accumulating capital, but rather each fund retains minimal, if any, amounts as capital of the fund and seeks to distribute the majority of the donations received in each income year.

³ **Anglicare** relates to approximately 40,000 clients on an annual basis with counselling, children and youth services, emergency relief, family relationships and aged care.

⁴ **Anglican Retirement Villages** operates 37 residential facilities (both Independent Living and Residential Care) and 40 community based services throughout the greater Sydney region, caring for more than 6,000 residents and clients and regularly relating to a further 12,000 people (families, staff, volunteers) in the course of its service delivery.

⁵ **Anglican Youthworks** is the co-ordinator of work amongst children and young people and provides materials to 300,000 students, supports 4,000 volunteer and employed scripture teachers, and 8,000 youth leaders attending training events. 50,000 mostly young people and children attend outdoor programs and centres.

⁶ Attended by approximately 33,000 students.

- (d) The importance of the parishes and their networks of people within congregations to the provision of services by Diocesan bodies and the distribution of charitable funds should not be underestimated. These are real communities of people within local communities who care deeply about a range of social issues. They are a natural social infrastructure which is an effective base for charitable fundraising and the provision of services which contribute to social inclusion.

3 Comments on the Exposure Draft

3.1 Introduction

- (a) We appreciate the opportunity to respond to the Exposure Draft and recognise the need to ensure the integrity of charitable funds. However, we raise concerns in relation to the requirement for the trustee of a new public ancillary fund to be a constitutional corporation.
- (b) While we recognise that the Exposure Draft is directly concerned only with the administration of public ancillary funds, we submit that in order to achieve targeted and appropriate reform to the charities and not-for-profit sector with the ultimate aim of improving accountability and reducing red tape, reforms of this nature must be considered in the context of the broader sector reform agenda. Combining the proposed reforms in this way will make it easier for the Government to understand and strengthen the sector and assist charities and not-for-profits to help those who need it for the ultimately benefit of the Australian community.
- (c) We outline our submissions in more detail below and note that we expect to make further comments in relation to the draft Guidelines within the timeframe provided for consultation.

3.2 Constitutional Corporations

- (a) We submit that the introduction of a requirement that the trustees of public ancillary funds be 'constitutional corporations' will create great uncertainty in the not-for-profit sector. While it is relatively clear in the for-profit sector whether or not an entity is a 'constitutional corporation' this is not so in the not-for-profit sector.⁷
- (b) It is notoriously difficult to determine whether a corporation that derives much of its revenue from government grants and donations and only a small part from trading or

⁷ In *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; 23 ALR 439 at CLR 234 Mason J (Jacobs J agreeing) stated that whether the trading activities are sufficient to render a corporation a constitutional one is very much a question of fact and degree.

financial activities is a constitutional corporation. Much of the case law in this area concerns the not-for profit sector.⁸

- (c) We acknowledge that greater certainty exists for established public ancillary funds due to the transitional rules which exempt existing funds from the trustee requirements until such time as they appoint a single corporate trustee. However that is a short term measure and only assists those funds that are presently in operation.
- (d) We submit that while the corporations' power achieves constitutional certainty for the Government in providing the Commissioner of Taxation with the regulatory powers proposed in the Exposure Draft, it creates operational uncertainty for not-for-profits and charities. This uncertainty is likely to impact on the ability of trustees for public ancillary funds to continue to fund charitable activities. This is particularly likely in the case of smaller public ancillary funds and those that do not seek to accumulate capital.

3.3 Recommendations

- (a) We therefore submit that the requirement for the trustee of a public ancillary fund to be a constitutional corporation should be removed.
- (b) Alternatively, we submit that two separate heads of exemption from this requirement should be provided to public ancillary funds:
 - (i) operated by religious institutions, which could be defined as those institutions that are members of denominations recognised under section 26 of the *Marriage Act 1961* (Cth) (**Marriage Act**); or
 - (ii) with an accumulated capital base up to \$2 million.
- (c) The trustees of public ancillary funds operated by parishes are generally the Wardens of the parish. The Wardens⁹ of a parish are responsible for the management of the finances and property of the parish and owe fiduciary duties in the way such responsibility is discharged. The Wardens are appointed by the parish in general meeting, and are accountable to the parish and to the Diocese in respect of the discharge of their duties. Consequently, the role of wardens is a very public role with a high degree of transparency and accountability.
- (d) If parishes are required to establish corporations to act as trustee, this will reduce the transparency and accountability in place under the Diocesan structure, and may create some confusion in relation to the appropriate application of church law to the directors of

⁸ See for example: *E v Australian Red Cross Society* (1991) 99 ALR 601 and *Quickenden v O'Connor* (2001) 109 FCR 243.

⁹ That is, the three persons required to be elected and appointed by each parish to take responsibility for the property and finances of the parish.

the trustee company. Imposing such requirement on parishes will therefore likely have a negative impact on the administration of public ancillary funds by parishes.

- (e) Further, religious institutions (such as the Diocese) that are members of religious denominations recognised under the Marriage Act are generally subject to a high degree of accountability by virtue of their organisational structures and reporting lines. For example, the Wardens of a parish are required to meet certain financial reporting standards under church law and are accountable to the Synod (being the principal governing body of the Diocese) in relation to those reports. Consequently, we submit that the policy intent of the proposed amendments continues to be met by exempting these religious institutions from the requirement for trustees to be constitutional corporations.
- (f) Additionally, we submit that, in respect of smaller public ancillary funds, it is likely that the benefit to the community arising from providing increased regulatory power to the Commissioner of Taxation is outweighed by the increased costs of administration for the fund and its trustee. The end result will be fewer funds available to pursue the purposes of those funds.
- (g) It will not be viable for many smaller public ancillary funds and those that do not seek to accumulate capital to establish a corporation solely for the purpose of acting as trustee of the fund given the compliance measures and costs that will come with the establishment and ongoing operation of the corporation. It may also not be viable for them to engage the services of a professional trustee corporation. This will mean many not-for-profits will look to existing corporations within their own structures to act as trustee. Typically these corporations will carry on a range of activities and there will be uncertainty about whether they are in fact 'constitutional corporations'.
- (h) For these reasons we suggest the introduction of a *de minimis* test exempting public ancillary funds with a smaller capital base (such as up to \$2 million) from the corporate trustee requirement.

2 August 2011