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Submission to Treasury regarding *The Exposure Draft for the Australian Charities and Not-for-profits Commission Bill 2012*

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

1 Summary of Submission

(a) The regulatory framework contemplated by the Exposure Draft for the Bill is, in places, unduly heavy-handed and therefore risks unnecessary and costly over-regulation of the NFP sector. This outcome would be inconsistent with the Government's stated basis for reforming the sector, namely to make it easier for charities to help those who need it by simplifying complex regulatory arrangements and removing unnecessary red-tape. The key aspects of the Bill that require substantial modification include –

- The object of the Act
- The reporting and audit tiers
- The scope of the definition of "responsible individual".

(b) We recommend that the Government not attempt to finalise the governance standards for inclusion in the Bill from 1 July 2012 but that finalisation of the standards be deferred until, say, 1 July 2013 followed by a suitable transition period to enable the sector to implement any necessary changes.

(c) We strongly oppose the formulation of the object of the Act "to promote public trust and confidence in not-for-profit entities that provide public benefits". We consider that the formulation of the object in this way is inconsistent with the basis for establishing the ACNC articulated by the Assistant Treasurer and the Minister for Human Services and Social Inclusion on 10 May 2011 and sends an extremely unhelpful signal of distrust to the sector.

(d) We recommend that the object of the Act should be reformulated as follows –

> "to enhance the capacity of the not-for-profit entities to provide public benefits through the fulfilment of their charitable and other purposes."

(e) We consider that the revocation of the registration of an entity on the basis that the Commissioner considers that continuing registration of the entity would cause a loss of public trust and confidence in the sector is too general and subjective. We consider the grounds of revocation need to be specified in terms of objective criteria.

(f) We recommend that the Commissioner be given a limited power to register entities as a group and receive reports from the group on a consolidated basis. For example, the power could be exercised in circumstances where the Commissioner is satisfied that –

(i) the entities in the group share a common purpose and are effectively controlled by the same responsible individuals as a functional whole, and

(ii) group registration and reporting is consistent with the object of the Act.

We submit that the capacity to group in appropriate circumstances would achieve substantial savings in the costs that would otherwise be incurred by both the entities in the group and the ACNC in regulating such entities.

(g) We recommend that consideration be given to specific provisions in the transitional legislation which allows an entity which has been registered on a grandfathered basis to opt out of registration within a specified period of time after 1 July 2012 without being required to wind-up.

(h) We recommend that the applicable thresholds for entity tiers (small, medium and large) and the reporting and audit requirements applicable to each tier be carefully reviewed in light of the full range of factors identified in the *Final report on a Scoping Study For a National Regulator* as relevant matters to take into account in determining reporting by registered entities.

(i) We recommend that, as a minimum, the Government consider the following modifications to the proposed entity tier structure and reporting/audit requirements –

- registered entities with annual revenues of less than $500k which are not DGRs and do not receive Government funding be treated as Tier 1 (small) entities (with reporting requirements as currently proposed).
- registered entities with annual revenues of between $500k and $2m or registered entities with annual revenues of less than $500k which are DGRs or receive Government funding be treated as Tier 2 (medium) entities.
- Tier 2 entities be permitted to provide financial reports in the form of special purpose financial statements as an alternative to general purpose

financial statements (with audit and review requirements as currently proposed).

- registered entities with annual revenues exceeding $2m be treated as Tier 3 (large) entities (with reporting and audit requirements as currently proposed).

(j) We recommend a 5 month time frame within which annual information statements and financial reports can be provided to the ACNC following the end of the relevant accounting period.

(k) We recommend that the Government consider reformulating the definition of "responsible individual" along the following lines –

(i) Subject to (ii) and (iii) below, limit the definition of responsible individual to the concept of a director of the governing board or council of the entity (including receivers, managers administrators etc).

(ii) Extend the definition of responsible individual to include the broader Corporations Act concept of "officer" only for large (Tier 3) NFP corporations.

(iii) For unincorporated NFP entities which have a large membership and no governing board or council, enable the entity to nominate a small representative group of, say, at least 5 individuals who exercise the most control of the entity by virtue of the office they hold (eg., President, Secretary, Treasurer, etc) to act as the responsible individuals for the entity.

2 Introduction

(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 which is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902* (NSW).

(c) 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 269 parishes, are accountable to the members of the Church through the Synod of the Diocese[1].

(d) 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 care for the homeless.

(e) We are grateful for the opportunity to comment on the exposure draft for the Australian Charities and Not-for-profits Commission Bill 2012 (**The Bill**) and broadly welcome the Government's initiative in establishing the Australian Charities and Not-for-profits Commission (**ACNC**).

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3 General Comments about the Legislation

3.1 Risk of over-regulating the sector

(a) As a general observation, the Bill, gives the impression that there is a systemic problem in the sector that needs to be addressed by the establishment of a regulator with extensive and fairly draconian powers to enforce a range of new obligations. We understand that it is necessary to give the ACNC adequate power to undertake its functions and that its enforcement powers are intended to be used in a small number of serious cases where the education and compliance functions of the ACNC have been unsuccessful. We nonetheless consider that key aspects of the Bill are unnecessarily heavy-handed and should be substantially modified .

(b) The key aspects of the Bill we consider need substantial modification include –

- the object of the Act – which we consider further in 4 below.

[1] In the last ABS Census 837,917 people in the Sydney region identified as being Anglican. The regular combined membership of our 269 parishes is about 80,000 people.

- the reporting and audit tiers – which we consider further in 9 below, and
- the scope of the definition of responsible individual – which we consider further in 11 below.

(c) In our view, these aspects of the Bill are inconsistent with the Government's stated basis for reforming the sector, namely to make it easier for charities to help those who need it by simplifying complex regulatory arrangements and removing unnecessary red tape. Our concern is that, the Bill, as presently drafted, will achieve the opposite outcomes, at least for many parts of the sector.

(d) In short we consider that the regulatory framework contemplated by the Bill risks unnecessary and costly over-regulation of the sector.

3.2 Deferral of governance standards until after 1 July 2012

(a) As indicated in our complementary submission regarding the *Review of Not-for-profit Governance Arrangements – Consultation Paper December 2011*, we recommend that the Government not attempt to finalise governance standards for the sector as part of the Bill by 1 July 2012, but to defer finalisation until, say, 1 July 2013. We also recommend that the sector be given a suitable transition period after the standards have been finalised to implement any necessary changes.

(b) It is imperative that the governance standards are able to be effectively applied across the whole of a very diverse and complex sector. The standards must strengthen the sector rather than burden it with unnecessary red-tape.

(c) We suspect that the underlying difficulty with some of the governance proposals, and indeed the proposed reporting/auditing requirements and definition of responsible individual, is that the models used have been largely lifted from the for-profit corporate world. While this is an understandable starting point, we believe that considerably more work needs to be done on developing an effective governance framework for the NFP sector in Australia than will be realistically possible by 1 July 2012.

(d) Aside from the desirability of not rushing to finalise suitable NFP governance standards, a later date of finalisation and a suitable transition period after the standards have been finalised will also give the sector a greater capacity to implement these reforms on a staged basis, in view of the enormous changes already facing the sector in other areas.

4 Object of the Act

(a) We note that the proposed object of the Act is "to promote public trust and confidence in not-for-profit entities that provide public benefits".

(b) We strongly oppose the formulation of the object for the Act in these terms. It is not clear to us why the issue of public trust and confidence in the sector has apparently become the predominant issue around which the ACNC and the related regulatory framework is being established.

(c) The basis for establishing the ACNC was articulated by the Assistant Treasurer and the Minister for Human Services in Social Inclusion in a joint media release of 10 May 2011 *Making it Easier for Charities to Help Those Who Need it*. To highlight the discrepancy between what was announced at that time and what has emerged as the object of the Act in the December 2011 exposure draft we set out in full the opening comments of the May 2011 media release –

> The Government will provide $53.6 million over four years to establish a one-stop-shop for the support and regulation of the NFP sector.
>
> This is a reform that has been sought for many years by the sector, and recommended in reports dating as far back as the *Report of the Inquiry into the Definition of Charities and Related Organisations* in 2001.
>
> The Australian Charities and Not-for-profits Commission (ACNC) will commence operations from 1 July 2012. It will initially be responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other NFP benefits on behalf of all Commonwealth agencies.
>
> The Commission will also implement a 'report-once use-often' reporting framework for charities, provide education and support to the sector on technical matters, and establish a public information portal by 1 July 2013. A Commissioner will be appointed to drive all the changes, who will be fully independent and report directly to parliament via the Assistant Treasurer.
>
> Assistant Treasurer and Minister for Financial Services and Superannuation, Bill Shorten, said "the NFP sector provides vital services to many of our most disadvantaged and vulnerable citizens, but the ability of the sector to undertake this work has been impaired

by complex regulatory arrangements and unnecessary red tape for far too long."

Minister for Human Services and Social Inclusion, Tanya Plibersek, said "I am delighted that the Gillard Government is delivering on this key reform for the sector, which has laboured under overly complex, duplicating regulatory requirements for too long"

"We will continue our negotiations with the states and territories on national regulation for the charitable sector, recognising that the greatest reduction in red tape can only be achieved with national coordination. But it is important for the Commonwealth to lead the way and get its own house in order."

The Government will set up an Implementation Taskforce from 1 July 2011. It will be responsible for ensuring the ACNC is ready for operation by 1 July 2012, and will also consult with the public, the NFP sector and government agencies on a new general reporting framework and public information portal.

(d) There is nothing in this announcement which indicates that public trust and confidence in the not-for-profit sector is a matter of particular concern and therefore is the primary driver for establishing the ACNC. The only possible allusion to this issue appears in the attachment to the media release:

> "However, the Government is concerned to ensure that reform for the section is not delayed. The Government will therefore act to improve the accountability and transparency for the sector while removing reporting overlaps for general reporting requirements at the Commonwealth level."

Accordingly to prepare an Act with the promotion of public trust and confidence in the sector at its centre is extremely unhelpful and sends a signal of distrust to the sector.

(e) In view of the announced policy position of the Government for establishing the ACNC, we submit that a more appropriate object of the Act would be as follows:

> "to enhance the capacity of not-for-profit entities to provide public benefits through the fulfilment of their charitable and other purposes".

This would not preclude the promotion of public trust and confidence being included as an aim to further the object of the Act under section 2-5(2)(a). However, the promotion

of public trust and confidence in the sector is not an end in itself and therefore should not remain as the principal object of the Act.

5 Definition of Not-for-Profit

(a) We note that the definition of "not-for-profit" is currently included in draft legislation to modify the "In Australia test" and related requirements to obtain and retain income tax exempt and deductible gift recipient status.

(b) We suggest that the definition of not-for-profit should be included in the ACNC legislation since the definition is to be used as part of the broader regulatory framework for NFP sector, which will not be limited to tax matters.

6 Revoking Registration

(a) We consider that section 10-55(e) by which registration may be revoked if the Commissioner considers that continuing registration of the entity would cause a loss of public trust and confidence in the sector is too general and subjective. We consider the grounds of revocation need to be specified in terms of objective criteria.

(b) This ground of revocation appears to flow from the current object to the Act to promote public trust and confidence in the sector which, as previously indicated, is not an appropriate object for the Act.

7 Group registration and consolidated reporting

(a) As currently drafted, the Exposure Draft contemplates that registration and consequential reporting requirements be undertaken solely at the entity level. We understand the rationale for registration and reporting at the entity level and acknowledge that, in the vast majority of cases, this is the appropriate way to regulate the sector.

(b) However we consider it would be appropriate to give the Commissioner a limited power to register entities as a group and receive reports from the group on a consolidated basis. For example, the power could be exercised in circumstances where the Commissioner is satisfied that –

(i) the entities in the group share a common purpose and are effectively controlled by the same responsible individuals as a functional whole, and

(ii) group registration and reporting is consistent with the object of the Act.

(c) We submit that the capacity to group in appropriate circumstances would achieve substantial savings in the costs that would otherwise be incurred by both the entities in the group and the ACNC in regulating such entities.

(d) The particular situation we have in mind for grouping in our context is the 300+ individual trusts held by the Corporate Trustee of the Diocese, the Anglican Church Property Trust Diocese of Sydney (***The Property Trust***). The property held in each of these trusts is "church trust property" within the meaning of *Anglican Church of Australia Trust Property Act 1917* (NSW) and therefore each trust, by definition, is held on trust for one purpose or another of the Anglican Church of Australia in the Diocese of Sydney. A key feature of all church trust property is that the synod of the relevant diocese in New South Wales is empowered under the Trust Property Act 1917 to deal with church property in various ways, including the power to vary the trusts of the property.

(e) The result is that, although technically each trust held by the Property Trust is a separate entity for tax purposes, in view of the nature of the property held in each trust and the powers of the diocesan synod to deal with such trusts, the costs for both the Diocese and the ACNC in insisting on the separate registration and reporting for each of these trusts would be appear to be unjustified.

(f) We would be happy to provide further details about this particular situation. However, for the time being we ask that the Government consider including in the ACNC legislation a discretionary power for the Commissioner to approve group registrations and consolidated reporting for such entities where such arrangements do not undermine the regulatory intention behind the legislation.

8 Consequences of Deregistration

(a) We note that the explanatory material indicates that an entity's decision to register with the ACNC is entirely voluntary although clearly the consequences of non-registration are that the entity would not be entitled to access various tax concessions and other entitlements that arise as a result of registration.

(b) We also understand that if, having been registered, an entity ceases to be registered either because the Commissioner revokes the registration or because the entity determines the costs associated with being a registered entity (e.g. audit and financial reporting costs etc) are such that registration is no longer justified, the entity will not only

lose its access to tax concessions and other entitlements but will be required to wind-up its operations. That is, the entity will cease to exist if it ceases to be registered.

(c) We regard this as a significant issue that needs to be carefully thought through.

(d) For example, entities which are already endorsed as income tax exempt charities will, as we understand, be taken to be registered under the ACNC legislation under transitional arrangements. While we assume that the vast majority of entities registered in this way will be happy to continue as registered entities into the foreseeable future, there may be a small number of entities who will seek to have their registration revoked. In such circumstances, it would be unfortunate for an entity to be required to wind-up.

(e) We therefore recommend that consideration be given to specific provisions in the transitional legislation which allows an entity which has been registered on a grandfathered basis to opt out of registration within a specified period of time after 1 July 2012 without being required to wind-up.

(f) If the Government is not prepared to extend this type of flexibility to all entities which are registered pursuant to grandfathering provisions, consideration should be given to extending this arrangement to those entities which do not have DGR status.

9 Reporting and Audit tiers

(a) We note that the 3 tiers proposed to be used for establishing the framework for reporting and audit requirements had been essentially adopted directly from the tiers of reporting recently introduced for companies limited by guarantee under the *Corporations Act 2001*. We also note that it is the Government's intention that all registered NFP entities provide a level of reporting to the ACNC, even if to date, they have been under no obligations to report to any Government agency (eg. unincorporated associations).

(b) We have no objection to the proposal that all registered entities should provide a level of reporting to the ACNC, although note that one of the primary drivers for the ACNC is the reduction of unnecessary red-tape through a "report once use often" outcome which will not necessarily be relevant to a large number of NFP entities who have little or no interaction with Government in terms of funding (for example most Anglican churches). The introduction of reporting for those entities which were previously under no obligation to report will generally add to the regulatory burden on such entities.

(c) However our main concern is the number of registered entities who currently have no reporting obligation to any Government agency which will be required to prepare general purpose financial statements subject to audit or review under tier 2 or 3. In many cases,

general purpose financial statements will be significantly less useful to an entity's stakeholders than special purpose financial statements. The significant cost of preparing general purpose financial statements and having such statements reviewed or audited in accordance with Australian Accounting Standards will therefore be difficult to justify for many entities, even if their annual revenue exceeds $250,000.

(d) We therefore recommend that the applicable thresholds for entity tiers (small, medium and large) and the reporting and audit requirements applicable to each tier be carefully reviewed in light of the full range of factors identified in the *Final report on a Scoping Study For a National Regulator* as relevant matters to take into account in determining reporting by registered entities. Such factors include not only size and DGR status, but also risk factors such as the receipt of Government funding.

(e) As a minimum, we recommend that the Government consider the following modifications to the proposed entity tier structure and reporting/audit requirements –

(i) registered entities with annual revenues of less than $500k which are not DGRs and do not receive Government funding be treated as Tier 1 (small) entities (with reporting requirements as currently proposed).

(ii) registered entities with annual revenues of between $500k and $2m or registered entities with annual revenues of less than $500k which are DGRs or receive Government funding be treated as Tier 2 (medium) entities.

(iii) Tier 2 entities be permitted to provide financial reports in the form of special purpose financial statements as an alternative to general purpose financial statements (with audit and review requirements as currently proposed).

(iv) registered entities with annual revenues exceeding $2m be treated as Tier 3 (large) entities (with reporting and audit requirements as currently proposed).

(f) In order to ensure a suitable level of integrity and comparability of information in any special purpose financial statements provided by a Tier 2 entity, it might be appropriate to give the ACNC power to mandate the adoption of certain accounting standards for the purposes of preparing such statements. We also note that Standard Business Reporting is in the process of being implemented and it is expected that this will provide enhanced levels of integrity and comparability of financial reporting generally.

(g) We encourage the Government to give serious consideration to these recommendations as a principal means to avoid unjustified over-regulation of the sector.

10 Timeframe for reporting

(a) We consider that an obligation to provide annual information statement and annual financial reports no later than 31 October in the following financial year (ie 4 months) is insufficient time. We recommend a 5 month time frame.

(b) We would also like to underline the importance of the Commission's power in section 55-90 to approve a different accounting period for registered entities. Aside from the need to accommodate the natural cycles under which some NFPs operate, it is likely that audit and review costs would substantially increase if all NFPs were required to finalise their accounts with a 30 June year end.

11 Responsible Individuals

(a) We have a significant concern about the scope of the definition currently proposed for "responsible individuals" in the Exposure Draft. In particular we consider that defining responsible individual in terms of the extended meanings given to directors and officers in the *Corporations Act 2001* is inappropriate in the NFP context for two main reasons.

(b) Firstly, there are a number of unincorporated bodies which have very large memberships who are responsible for making the decisions of the body in the absence of a board. For example, in the case of the Synod of the Anglican Church Diocese of Sydney, the definition of responsible individual as currently proposed would lead to the impossible situation of approximately 800 members of the synod being regarded as responsible individuals since each member is an individual who "makes, or participates in making, decisions that will affect the whole or a substantial part, of the registered entity's activities". Similar issues arise in relation to identifying the responsible individuals of the Anglican parish which, under the proposed definition, could extend to any person who is entitled to attend the annual general meeting of a parish (traditionally known as the annual vestry meeting). Again, given the very broad requirements that entitle a person to attend such a meeting, the identification and the number of individuals who might be regarded as responsible individuals under the proposed definition could be practically impossible to manage.

(c) The second reason why it is not appropriate to use the *Corporations Act 2001* to define responsible individuals in the NFP context is that unlike many for-profit corporations, NFP entities often call on broad range of individuals, often volunteers, to become involved in various decision making processes of the entity. This is particularly the case with smaller, grass-roots NFP entities such as churches.

(d) In view of these issues, we recommend that the Government consider reformulating the definition of “responsible individual” along the following lines –

(i) Subject to (ii) and (iii) below, limit the definition of responsible individual to the concept of a director of the governing board or council of the entity (including receivers, managers administrators etc).

(ii) Extend the definition of responsible individual to include the broader Corporations Act concept of “officer” only for large (Tier 3) NFP corporations.

(iii) For unincorporated NFP entities which have a large membership and no governing board or council, enable the entity to nominate a small representative group of, say, at least 5 individuals who exercise the most control of the entity by virtue of the office they hold (eg., President, Secretary, Treasurer, etc) to act as the responsible individuals for the entity.

25 January 2012