

Friday, 28 September 2018



Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ExternalConductStandards@treasury.gov.au

Dear Treasury,

Submission with respect to the exposure draft external conduct standards under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* ("ACNC Act")

Thank you for the opportunity to provide submissions regarding Treasury's exposure draft external conduct standards.

The Anglican Diocese of Tasmania welcomes the proposed standards as ensuring that the operations of registered entities overseas have appropriate transparency, comply with applicable Australian laws, and take reasonable steps to mitigate the risk of fraud and to prevent abuse and exploitation of vulnerable people.

We believe the exposure draft can be improved in four key respects to clarify better the obligations of registered entities, including registered entities such as the Anglican Diocese of Tasmania, and individual parishes and church related bodies within the Diocese.

Background

The Anglican Diocese of Tasmania is the oldest continuing diocese in Australia having been established in 1842 by Letters Patent signed by Queen Victoria. The Diocese's first bishop was consecrated at Westminster Abbey on August 24, 1842.

The Diocese now comprises some 48 parishes and congregations across Tasmania, as well as schools, aged care facilities and affiliated bodies such as Anglicare Tasmania.

The core mission of our Diocese is not to serve ourselves, but rather to be a missionary society for the world around us, as a people sent by our Lord Jesus on mission to Tasmania and around the world, to preach the good news about Jesus and to do good works in His name. This is not a mission for our clergy alone, nor just for the leaders among us, but the mission of every believer.

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We express this mission in our activities as a Diocese, as parishes and as individuals. This includes occasions where the Diocese will commission people and commit resources to other Christian agencies for Christian work here and overseas and arrangements at parish level, where individual parishes may support other parishes or individual missionaries here and overseas. At an individual level, our members work with, fundraise for, and volunteer for a variety of overseas charitable activities and members of our clergy are, at times, employed as chaplains serving overseas with the Australian Defence Force.

Recommendations

With the above background, we believe the exposure draft can be improved in the following respects:

1. Clarifying that incidental activities of *third parties* do not fall under the standards;
2. Providing an exception for resources (including funds) provided to, or arrangements with, other registered entities;
3. Defining *reasonable steps/reasonable procedures* to take into account relevant circumstances; and
4. Allowing reasonable protections consistent with Subdivision 45-C of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) with respect to the governance standards.

Explanations for each of the above recommendations are set out below.

Incidental activities of 'third parties'

Proposed section 50.4 provides that the standards apply to a registered entity, or a third party, which operates outside Australia, wholly or partially.

Subsection (2) clarifies that “a registered entity does not operate outside Australia only because it carries out activities outside Australia that are merely incidental to the operation and pursuit of a registered entity’s purposes in Australia.” In addition, the exposure draft explanatory memorandum includes helpful examples of where activities of registered entities will be considered merely incidental.

However, there is no comparable clarification with respect to the incidental activities of third parties. Including this clarification is especially important as a registered entity may not be aware or able to determine whether a third party is indeed operating overseas where those activities are merely incidental.

We recommend that the clarification in proposed subsection 50.4(2) be extended to the incidental activities of third parties.

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Resources (including funds) provided to, or arrangements with, other registered entities

The current exposure draft requires a registered entity to comply with the standards where it works with a third party who operates wholly or partially overseas. This obligation would apply even if the third party is, itself, a registered entity subject to the external conduct standards.

For example, if a parish (a registered entity) donates money to a poverty relief agency (another registered entity) to perform poverty relief work overseas, then under the exposure draft standards both the parish and the agency will be required to separately comply with the external conduct standards – even if the agency is a large DFAT accredited aid and development agency. This is an unnecessary duplication and contrary to one of the three objects of the ACNC Act “to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector” (Section 15-5(1)(c)).

Registered entities, as with members of the public, ought to be able to rely upon the integrity of the ACNC Register, including that those registered entities operating overseas are held to compliance with the external conduct standards.

We recommend that the definition of third party in the proposed amendment to Section 4 expressly exclude registered entities.

Defining reasonable steps/reasonable procedures to take into account relevant circumstances

Throughout the exposure draft there is the use of the phrase “reasonable steps” or “reasonable controls”. Whilst the exposure draft explanatory memorandum clarifies that “what is reasonable depends on the circumstances”, this important clarification is not contained within the body of the standards themselves.

We are deeply aware that the contexts within which overseas charitable activities are undertaken vary significantly. Accordingly, we recommend that the standards include a suitable definition of “reasonable steps” and “reasonable procedures” to clarify that what is meant are reasonable steps or procedures in the relevant circumstances.

Allowing reasonable protections consistent with Subdivision 45-C of the Regulations

Subdivision 45-C of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) identifies certain activities, which if undertaken, allow a registered entity to meet its obligation to take reasonable steps with respect to its obligations under the governance standards. These include (broadly):

- reliance upon professional advice in good faith (Protection 1);

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- the “business judgement rule” (ie good faith, properly informed decisions made with the rational belief that it is in the best interests of the entity) (Protection 2);
- certain protections with respect to incurring debts and insolvency (Protection 3); and
- certain protections where unwell or for other good reasons (Protection 4)

In our view, the above protections should all be adapted to apply with respect to the external conduct standards. Some of these protections, such as Protections 1 and 2, could be made to apply without significant adaptation. The principle behind Protection 3 could be adapted to apply to the reasonable screening steps required for registered entities to prevent fraud or bribery/corruption or to undertake counter-terrorism screening. Similarly, Protection 4

could be adapted to cover circumstances where, due to unrest, conflict, natural disasters (or other comparable intervening circumstances) a registered entity is prevented from taking appropriate reasonable steps.

In addition, given the reliance in the overseas context of guidance, policies and contractual obligations with DFAT and other Government Departments and agencies, a protection ought to be available for a registered charity who follows such guidance, policies or contractual obligations.

Accordingly, we recommend that the external conduct standard include appropriate protections modelled upon those contained in the governance standards and adapted to the particular circumstances of overseas work.

Yours Faithfully,



James Oakley

General Manager/Registrar

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