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‘External Conduct Standards for charities registered with the  
Australian Charities and Not-for-profits Commission’

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Oxfam Australia Submission

**28 SEPTEMBER 2018**

**Contact**

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

28 September 2018

By email: [externalconductstandards@treasury.gov.au](mailto:externalconductstandards@treasury.gov.au)

Dear Sir/Madam

**External Conduct Standards for charities registered with the Australian Charities and Not-For-Profits Commission**

Oxfam Australia welcomes the opportunity to respond to the *External Conduct Standards for charities registered with the Australian Charities and Not-For-Profits Commission (ECS)*.

This submission is set out in three parts:

- A. Background information about Oxfam Australia.
- B. Recommendations.
- C. The basis for our recommendations.

**A. About Oxfam Australia**

Oxfam Australia is an independent, not-for-profit, secular development agency whose vision is of a just world without poverty. Oxfam Australia:

- undertakes long-term development programs;
- provides emergency response during disaster and conflict;
- undertakes research, advocacy and campaigns to advance the rights of poor and marginalised people, including women and works with them to achieve equality; and
- promotes fair trade, supporting local artisans and producers throughout shops and Fairtrade food brand.

We are a long-term Australian Government development partner. In our 2016-17 financial year, Oxfam Australia directly reached more than 1.8 million people of a total of 19.2 million people in 80 countries that Oxfam reached around the world. Through our advocacy and policy work, we have reached millions more. Oxfam Shops also support hundreds of producer partners and artisans in countries around the world, including Indigenous Australian producers and businesses. More than half a million Australians annually support Oxfam Australia by contributing skills, time and financial support to advance our work.

Oxfam Australia is a member of Oxfam International, a global confederation of organisations that work together, last year collectively reaching more than tens of millions of people around the world.

Oxfam Australia (**Oxfam**) is registered as a charity under the *Australian Charities and Not-for-profit Commission Act 2012* (Cth) (**ACNC Act**), and is registered with the entity sub-type of public benevolent institution (**PBI**).

As a PBI, Oxfam is endorsed as a whole as a deductible gift recipient (**DGR**).

Oxfam is also endorsed as a DGR for the operation of an Overseas Aid Fund. To operate an Overseas Aid Fund Oxfam must also comply with the Department of Foreign Affairs and Trade's (**DFAT**) Overseas Aid Gift Deductibility Scheme (**OAGDS**) Guidelines and Australian Tax Office Rulings.

Oxfam operates within a framework of standards through its membership of the Australia Council for International Development (**ACFID**) and through being a signatory to its Code of Conduct.

These particular Guidelines, Rulings and Codes set the legal context for Oxfam Australia as a large Australian charity with DGR status operating outside and inside Australia.

## **B. Recommendations**

### **Recommendation 1**

Insert a new subsection 50.4 (3):

- (3) However, a third party does not operate outside Australia only because it carries out activities outside Australia that are merely incidental to the operation of and pursuit of objects or purposes in Australia by the registered entity to which the third party relates.

### **Recommendation 2**

1. We recommend that the definition of "third party" in Section 4 of the Regulations be amended as follows:

**third party**, in relation to a registered entity, means an entity (other than a registered entity) that formally or informally collaborates with the registered entity for the purpose of advancing the registered entity's purpose or purposes, and includes:

- (a) an entity (other than a registered entity) with which the registered entity has some form of membership, association or alliance; and
  - (b) an entity (other than a registered entity) that has an arrangement with the registered entity.
2. We recommend that the references to "third parties" in proposed subsection 50.30(3)(a) and (b) be replaced with "third parties acting on behalf of, or with resources from, the registered entity".
  3. Similarly, the references to "third party in collaboration with the registered entity" in proposed subsection 50.35(3) and (4) should be amended to read "third party acting on behalf of, or with resources from, the registered entity".

### **Recommendation 3**

Standard 1: either delete Standard 1 in its entirety or redraft the provision so there is no overlap with Governance Standard 3.

### **Recommendation 4**

Standard 1, subsection 50.20 (4) should be deleted.

Or, if subsection 50.20 (4) is retained:

Insert "...applicable..." before "...Australian laws..." in Standard 1, subsection 50.20 (4).

Specify the relevant laws (or relevant parts thereof) that are intended to be caught by the list in subsection 50.20 (4).

#### **Recommendation 5**

Standard 2 section 50.25 (3) requires further consultation with the sector.

#### **Recommendation 6**

Section 4 of the Regulations be amended to include a definition of “reasonable steps” and “reasonable internal control procedures” to clarify that these terms are to be interpreted by reference to the relevant circumstances and context. Alternatively the reference to relevant circumstances and context should be inserted into each of the relevant ESCs.

#### **Recommendation 7**

Taking a similar approach to Subdivision 45-C, the following protections be incorporated:

- (a) A protection for actions taken or omissions in accordance with professional advice (including recommendations from DFAT, the Australian Defence Force or the Australian Intelligence community) (cf. Protection 1 under subsection 45.105);
- (b) A protection for actions taken or omissions in accordance with:
  - (i) DFAT policy or contractual requirements;
  - (ii) the Overseas Aid Gift Deductibility Guidelines (OAGDS);
  - (iii) with international humanitarian laws; or
  - (iv) nationally or internationally accepted standards or procedures (eg ACFID Code of Conduct and SPHERE Humanitarian Principles).
- (c) A protection for actions taken or omissions in good faith for a proper purpose, in the absence of a conflict of interest, following reasonable inquiry and rational belief (cf Protection 2 under subsection 45.110);
- (d) A protection, with respect to solvency, that the responsible entity had reasonable grounds to expect that the entity would remain solvent or that it took all reasonable steps to prevent the relevant debt from being incurred (Cf Protection 3 under subsection 45.115);
- (e) A protection for any act taken or omission occurred by reason of ‘force majeure’ (eg conflict, natural disasters, etc) (Cf Protection 4 under subsection 45.120 with respect to ill health).
- (f) A protection for any act taken or omission by reason that there is a threat to personal safety of the personnel of the registered entity.

#### **Recommendation 8**

In Standard 3, amend subsection 50.30 (3)(a) by replacing “to minimise any risk” with “to mitigate the risk”.

Delete ‘perceived...’ in subsection 50.30 (3)(b).

Insert a definition of ‘material conflict of interest’ in subsection 50.30 (3)(b).

### **Recommendation 9**

In Standard 4, amend subsection 50.35 (1) by inserting the word "...or exploitation..." before the word "...abuse..."

Amend subsection 50.35(3) by substituting ‘...The registered entity must take reasonable steps to minimise the risk of abuse and exploitation of vulnerable individuals outside Australia to whom the registered entity provides services or benefits...’ for ‘...The registered entity must take reasonable steps to ensure the safety of vulnerable individuals outside Australia in relation to those individuals being provided with services or accessing benefits under programs provided by...’

## **C. Basis for our recommendations**

### ***Introduction***

1. Oxfam supports appropriate standards for charities who operate or fund other organizations overseas: standards are essential for an organization’s resilience and provide a sustainable framework for charities working towards long term solutions to complex global challenges. The ECS can operate as a proactive prompt for organizations to develop and implement a framework to manage potential misconduct.
2. Oxfam recognizes that devising a single set of standards that are concrete, meaningful and useable by the different types of Australian registered entities – with different purposes, legal status and size is a challenging task. Given the diversity of the sector a principles based balanced approach is appropriate.
3. In addition to the diverse types of charities likely to engage in some form of overseas activity, another complexity is the interplay between many countries’ legal systems. This is amplified when charities cooperate with several civil society organizations – some of whom may come from a different country; each organization may have a different registration and laws that apply to them, and they may be working together in yet another country with its own sets of laws about conduct. Because of this, a long-term an inter-governmental approach that coordinates and sets best practice international conduct standards could reduce red tape for individual Australian charities. This would create the space for organizations to focus on equally important areas, such as the human resources practice and culture.

### ***Resourcing***

4. Adequate resourcing to the ACNC will be needed to publish guidance and services as soon as practically possible. There will be foreseeable increased demand from charities – approximately 4,000 charities are thought to be impacted. Some of these resources could be made available in languages other than English to support charities working with particular communities in Australia and with overseas third parties.
5. Better public understanding about ‘administrative’ costs incurred by charities will be needed. Charities who are not yet reporting to a standards framework may have to invest time and resources to implement the ECS and will need to budget adequately as their context and risks evolve. In view of

its objects<sup>1</sup> the ACNC has a role to play in supporting public understanding of administrative costs and the long term benefits to the community arising from charities who invest in a properly resourced standards framework.

6. Realistic and practical timelines need to be set for implementation, so that charities are given adequate time to develop and implement systems.
  7. For those charities who are already operating to high standards, it would be helpful if standards that are currently acceptable are identified as comparable and acceptable to meet the ECS. For example, a charity whose framework meets the standards set down in the ACFID Code of Conduct and the OAGDS Guidelines could be recognized as satisfying the obligations under the ECS. This would contain potentially duplicative administrative and reporting costs.
- 8. Oxfam's specific recommendations focus on:**
- clarifying the application of the Standards;
  - avoiding regulatory duplication;
  - minimising regulatory burdens;
  - better defining reasonable steps and allowing for reasonable protections;
  - clearly defining the required obligations.

***Clarifying the application of the Standards***

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9. The application of the ECS could be clarified for third parties to exclude third parties whose incidental activities are insufficient to trigger the application of the ECS (in the same way as subsection 50.4 (2) currently provides):

***Recommendation 1***

Insert a new subsection 50.4(3):

- (3) However, a third party does not operate outside Australia only because it carries out activities outside Australia that are merely incidental to the operation of and pursuit of objects or purposes in Australia by the registered entity to which the third party relates.

10. Depending upon what exactly is meant by “working with” a third party: if a registered entity (a “giving” charity) makes a grant of funds to Oxfam, both it and Oxfam are covered by the ECSs. This is an unnecessary duplication.
11. Subsections 50.30(3) and 50.35(3) & 50.35(4) ought to be narrowed to ensure they only apply with respect to third parties where those third parties are subject to the control of the registered entity, acting on its behalf or using resources provided by the registered entity.

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<sup>1</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s.15.5(1)(a) (“**ACNC Act**”)

Recommendation 2

1. We recommend that the definition of “third party” in Section 4 of the Regulations be amended as follows:

**third party**, in relation to a registered entity, means an entity (other than a registered entity) that formally or informally collaborates with the registered entity for the purpose of advancing the registered entity’s purpose or purposes, and includes:

(a) an entity (other than a registered entity) with which the registered entity has some form of membership, association or alliance; and

(b) an entity (other than a registered entity) that has an arrangement with the registered entity.

2. We recommend that the references to “third parties” in proposed subsection 50.30(3)(a) and (b) be replaced with “third parties acting on behalf of, or with resources from, the registered entity”.

3. Similarly, the references to “third party in collaboration with the registered entity” in proposed subsection 50.35(3) and (4) should be amended to read “third party acting on behalf of, or with resources from, the registered entity”.

**Avoiding regulatory duplication**

12. Proposed Standard 1 and Governance Standard 3, s50.70(2) of the Income Tax Assessment Act 1997 overlap.

Recommendation 3

Standard 1: either delete Standard 1 in its entirety or redraft the provision so there is no overlap with Governance Standard 3.

13. Proposed Standard 1, subsection 50.20 (4) requires a registered entity to comply with Australian laws. Given a registered entity is already obliged to comply with laws we question the need to restate this and the policy basis for subsection 50.20 (4).

14. If a registered entity fails to comply with a law, an appropriate authority is responsible for enforcement already, for example, in relation to crimes, the Australian Federal Police. Again, 50.20 (4) appears to duplicate existing frameworks and we question the need for the subsection; it should be deleted, in view of the ACNC’s object of reducing unnecessary regulatory obligations<sup>2</sup>.

15. Further to this, the ACNC Review Panel recently noted (about Governance Standard 3 which also restates the need to comply with law) “...it is not the function of the ACNC to force registered entities to enquire whether they may or many not have committed an offence (unrelated to the ACNC’s regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.”<sup>3</sup>

<sup>2</sup> Ibid s 15.5 (1) (c)

<sup>3</sup> ACNC Legislation Review Panel, The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profit Commission Legislation Review* (2018) p 47

16. If subsection 50.20 (4) is retained then the legal 'topics' list in 50.20 (4) should clarify that the requirement is to comply with applicable Australian laws and the relevant laws should be listed.

**Recommendation 4**

Standard 1, subsection 50.20 (4) should be deleted.

Or, if subsection 50.20 (4) is retained:

Insert "applicable" before "Australian laws" in Standard 1, subsection 50.20 (4).

Specify the relevant laws (or relevant parts thereof) that are intended to be caught by the list in subsection 50.20 (4).

**Minimising regulatory burdens**

17. Standard 2, subsection 50-25 (3) requires a registered entity to maintain records to the extent needed to prepare an annual summary of its operations and activities outside Australia on a country by country basis (an 'overseas activities statement'). Under proposed subsection 50-25 (4) a registered entity must include information as part of its annual information statement if the Commissioner requires. It is difficult to assess the regulatory impact on registered entities and third parties - given that the format is a work in progress.

**Duplicate reporting**

18. Many registered entities already report to DFAT under their contract requirements for funded projects. If a means could be found to consolidate or simplify reporting, so registered entities who already report to government need to report only once, this would mitigate the potential for multiple reports to different agencies.

**Risk based approach**

19. The Explanatory Memorandum says the policy basis for the proposed overseas activities statement is to assist "in meeting Australia's obligations under FATF Recommendation 8<sup>4</sup>. However FATF Recommendation 8 recommends a risk-based approach and notes a one size fits approach is "not appropriate".
20. It could be made more evident in subsection 50-25 that this risk based approach should be applied when it comes to record keeping. A risk based approach would ensure charities' administrative costs are applied in proportion to the risk in their particular context. A risk based approach by the ACNC would enable the ACNC to focus its resources where they are needed or most likely to be effective.

**Documented claims of inappropriate behavior**

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<sup>4</sup> Financial Action Task Force, Best Practices: Combating The Abuse Of Non-Profit Organisations (Recommendation 8) June 2015



21. Retaining “details of any documented claims of inappropriate behaviour” requires careful consideration, to avoid unintended consequences or disclosure of information that identifies whistleblowers, victims or witnesses. The perception of this risk may discourage reporting of incidents to the registered entity.
22. Careful consideration is required for how this information may be provided to the Commissioner - while preserving confidentiality, privacy and protection of whistleblowers, victims or other parties.

Recommendation 5

Standard 2 section 50.25 (3) requires further consultation with the sector.

***Better defining reasonable steps and allowing for reasonable protections***

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Reasonable steps

23. Throughout the proposed ECSs registered charities are required to use “reasonable steps” or “maintain reasonable internal control procedures” (ss50-20(3), 50-30(3), & 50-35(3) and (4)).
24. Whilst the EM correctly acknowledges that “what is reasonable depends on the circumstances”, this important guidance should be expressed within the proposed standards.
25. It is important to recognize that what is “reasonable” can differ markedly depending on where organizations work and what they do. circumstances can range from emergency settings and conflict zones - where the activity is short term and immediate - to stable contexts, where long term development projects are viable.

Recommendation 6

Section 4 of the Regulations be amended to include a definition of “reasonable steps” and “reasonable internal control procedures” to clarify that these terms are to be interpreted by reference to the relevant circumstances and context. Alternatively the reference to relevant circumstances and context should be inserted into each of the relevant ESCs.

Reasonable protections

26. Oxfam recommends that the protections available under Subdivision 45-C should be available for the ECSs. For example, if a registered entity is complying with comparable standards, such as with DFAT’s counter-terrorism or fraud reporting requirements, then registered entities ought to be able to rely upon that as sufficient reasonable steps to comply with the corresponding ECS.

Recommendation 7

Taking a similar approach to Subdivision 45-C, the following protections be incorporated:

- (a) A protection for actions taken or omissions in accordance with professional advice (including recommendations from DFAT, the Australian Defence Force or the Australian Intelligence community) (cf. Protection 1 under subsection 45.105);

- (b) A protection for actions taken or omissions in accordance with:
  - (i) DFAT policy or contractual requirements;
  - (ii) the Overseas Aid Gift Deductibility Guidelines (OAGDS);
  - (iii) with international humanitarian laws; or
  - (iv) nationally or internationally accepted standards or procedures (eg ACFID Code of Conduct and SPHERE Humanitarian Principles).
- (c) A protection for actions taken or omissions in good faith for a proper purpose, in the absence of a conflict of interest, following reasonable inquiry and rational belief (cf Protection 2 under subsection 45.110);
- (d) A protection, with respect to solvency, that the responsible entity had reasonable grounds to expect that the entity would remain solvent or that it took all reasonable steps to prevent the relevant debt from being incurred (Cf Protection 3 under subsection 45.115);
- (e) A protection for any act taken or omission occurred by reason of 'force majeure' (eg conflict, natural disasters, etc) (Cf Protection 4 under subsection 45.120 with respect to ill health).
- (f) A protection for any act taken or omission by reason that there is a threat to personal safety of the personnel of the registered entity.

### ***Clearly defining the required obligations***

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#### ***Anti-fraud/corruption***

27. Standard 3 subsection 50.30 (3) requires a registered entity to take reasonable steps:

- (a) to minimise any risk of corruption, fraud, bribery or other financial impropriety by its responsible entities, employees, volunteers and third parties outside Australia; and
- (b) to identify and document any perceived or actual material conflicts of interest for their employees, volunteers, third parties and responsible entities outside Australia (emphasis added)

Oxfam recommends "...to mitigate the impact of risk..." is preferred wording rather than "...minimize any risk..."

28. In proposed subsection 50.30(3) (b), the reference to "perceived" should be deleted in relation to conflicts of interest as its legal meaning is unclear and capable of varied interpretation. The ACNC Review Panel recently recommended that 'perceived' be removed from Governance Standard 5.

29. In proposed subsection 50.30(3) (b), the reference to "material" conflicts of interest is uncertain and should be clarified through a suitable definition that reflects a targeted risk based approach.

Recommendation 8

In Standard 3, amend subsection 50.30 (3)(a) by replacing “to minimise any risk” with “to mitigate the risk”.

Delete ‘perceived...’ in subsection 50.30 (3)(b).

Insert a definition of ‘material conflict of interest’ in subsection 50.30 (3)(b).

Minimising the Risk of Exploitation

30. Oxfam notes the definition in Section 4 of “vulnerable individual” is expressed to include an individual who is unable to protect themselves against harm or exploitation. For clarity, we recommend the word “...or exploitation...” be added to Standard 4 subsections 50.35 (1) and (3).

Ensure the Safety

31. As referred to above, the requirement ‘to ensure the safety of’ is better expressed as a requirement to seek to ‘...minimise the risk of abuse...in subsection 50.35 (3).

32. This wording change is consistent with the principles expressed in the ACFID Code of Conduct and the Protection Principles under the SPHERE Humanitarian Principles.

Recommendation 9

In Standard 4, amend subsection 50.35 (1) by inserting the word “...or exploitation...” before the word “...abuse...”

Amend subsection 50.35(3) by substituting ‘...The registered entity must take reasonable steps to minimise the risk of abuse and exploitation of vulnerable individuals outside Australia to whom the registered entity provides services or benefits...’ for ‘...The registered entity must take reasonable steps to ensure the safety of vulnerable individuals outside Australia in relation to those individuals being provided with services or accessing benefits under programs provided by...’

If you have any queries regarding our submission, please contact Sari Baird (General Counsel)  
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Yours faithfully



Sari Baird

**General Counsel**

**Oxfam Australia**

28 September 2018