World Vision Australia

Submission regarding the exposure draft ACNC external conduct standards

21 September 2018

This paper sets out the submission of World Vision Australia (**WVA**) in response to the exposure draft external conduct standards (**ECS**) for charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**) published on https://treasury.gov.au/consultation/c2018-t317739/.

This submission primarily addresses matters that are important and relevant to WVA as well as noting other matters which we consider would be of concern to other registered charities generally.

We have set out below:

- Background information in respect of WVA at heading 1.
- Our recommendations at heading 2.
- The basis for our recommendations at heading 3.

1. Background

WVA is a Christian relief, development and advocacy organisation dedicated to working with children, families and communities to overcome poverty and injustice. It is part of the World Vision International Partnership which operates in more than 90 countries. WVA is Australia's largest overseas aid and development organisation, operating primarily to assist overseas communities living in poverty. It also carries out development work in Australia with Indigenous communities, working collaboratively with both government and non-government organisations in Australia.

WVA is a 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, WVA as a whole is endorsed as a deductible gift recipient (**DGR**). In addition to this, WVA is endorsed as a DGR for the operation of an overseas aid fund and a necessitous circumstances fund. We have previously been endorsed as a DGR for the operation of a developed country disaster relief fund for the Japan Earthquake and Tsunami in 2011.

As Australia's largest overseas aid and development charity (with a growing domestic program), our registration with the ACNC enables us to more effectively perform vital functions both overseas and in Australia, to have greater impact and to more effectively achieve our mission. Our access to the relevant tax concessions, including our ability to provide tax deductible receipts, is crucial to encouraging and sustaining public donations to support our work.

2. Our recommendations

Our recommendations are as follows:

Recommendation 1

Insert a new subsection 50.4(3) as follows:

(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

Update the EM to include an example demonstrating that the use (even the frequent use) of overseas hosted cloud based information technology services is considered merely incidental. Similarly, the use of back-office accounting or payroll administration services should also be excluded.

Recommendation 3

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 4

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

Recommendation 5

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

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

3. Clarify whether the reference to "expenditure" in subsection 50.20(5) in intended to capture actual expenditure and expenditure under applicable accounting standards.

Recommendation 6

1. Paragraph (e) of the "Example" in subsection 50.25(3) be deleted and the EM be updated accordingly.

2. There be further consultation with the sector on the issues around "documented claims".

Recommendation 7

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 8

Taking a similar approach to Subdivision 45-C, WVA recommends 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 9

1. In subsection 50.30(3)(a), replace "to minimise any risk" with "to mitigate the risk".

2. Insert a definition of "material conflict of interest" for the purposes of subsection 50.30(3)(b).

Recommendation 10

Section 50.35(3) be amended by replacing "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" with "The registered entity must take reasonable steps to minimise the risk of abuse and exploitation of vulnerable individuals outside Australia who are benefit recipients of the registered entity or a third party acting on behalf of, or with resources from, the registered entity".

3. Basis for our recommendations

Introduction

WVA welcomes the Government's intention to introduce of the ECS and wants to work with Treasury to improve the draft standards to ensure they provide a sound integrity mechanism for applying a consistent standard for all registered charities that operate overseas.

We understand that the intended purpose of the ECS (as described in the explanatory memorandum to the ACNC Act) are to be principle-based minimum standards which:

- regulate funds sent by registered entities outside Australia and activities engaged in by such entities outside Australia; and
- empower the ACNC Commissioner to take enforcement action in relation to any registered entity's operations offshore where there is a contravention of these standards (and such enforcement action could include giving warnings and directions, seeking enforceable undertakings, seeking injunctions, or suspending or removing responsible persons).

Our view is that a robust set of standards is necessary to undergird the overseas activities of the increasing numbers of PBIs that operate overseas and which do not currently need to comply with the same sort of principles as set by the many organisations that are signatories to the Code of Conduct of the Australia Council for International Development (**ACFID**), or that operate Overseas Aid Funds and are therefore subject to the Department of Foreign Affairs and Trade's Overseas Aid Gift Deductibility Scheme (**OAGDS**) Guidelines.

The standards to be promulgated should however be balanced: we recommend that they should be consistent with existing requirements about "external conduct" as found in the ACFID Code of Conduct and the OAGDS Guidelines, and also be proportionate for the range of registered charities undertaking overseas activities.

With the above objectives WVA recommends that draft standards can be improved in the following ways:

- getting the regulatory focus right;
- avoiding regulatory duplication;
- minimising regulatory burdens;
- better defining reasonable steps and allowing for reasonable protections;
- clearly defining the required obligations.

Getting the regulatory focus right

WVA considers that the current proposed application of the ECS is too broad and will generate unintended and adverse impacts.

Proposed subsection 50.4 provides as follows:

> **50.4 Application—operating outside Australia**
>
> (1) For this Division, a registered entity, or a third party, operates outside Australia if it operates outside Australia in whole or in part.
>
> (2) However, 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. *(emphasis added)*

Excluding incidental activities

Proposed subsection 50.4(2) clarifies that incidental activities by a registered entity are insufficient to trigger the application of the external conduct standards but provides no equivalent clarification for third parties. This gap should be addressed:

Recommendation 1

Insert a new subsection 50.4(3) as follows:

> (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.

Whilst the exposure draft explanatory memorandum (**EM**) provides helpful examples clarifying what are intended to be merely incidental activities, the EM does not include any examples of the use of IT infrastructure, including commonly used overseas hosted cloud based services and back-office services.

Recommendation 2

Update the EM to include an example demonstrating that the use (even the frequent use) of overseas hosted cloud based information technology services is considered merely incidental. Similarly, the use of back-office accounting or payroll administration services should also be excluded.

Third parties

The new regulations propose to include in Section 4 the following definitions:

> ***arrangement*** has the same meaning as in the *Income Tax Assessment Act 1997* (which defines the term to mean "any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings").
>
> ***third party***, in relation to a registered entity, means an 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 with which the registered entity has some form of membership, association or alliance; and
>
> (b) an entity that has an arrangement with the registered entity.

In our view, the current drafting of subsection 50.4 and the proposed new definitions of "third party" and "arrangement" casts the "net" far too widely and will cause unnecessary duplication.

For example:

- An Europe based multilateral organisation provides funding to a World Vision Ethiopia (**WVE**) to conduct an agriculture project in Ethiopia. WVA provides no resources to the project. WVA and WVE are affiliated, share the same charitable purposes and work with each other on other projects in Ethiopia.

  As currently drafted, WVE is a "third party" of WVA with which WVA is working.

  Accordingly, proposed subsection 50.30(3) would require WVA to take reasonable steps to minimise any risk of corruption, fraud, bribery or other financial impropriety by WVE and to identify and document any perceived or actual material conflicts of interest for WVE. This requirement would extend to *all* activities of WVE even with respect to activities not resourced by WVA.

- A United States based funder provides funding to WVA and another local NGO to conduct a reforestation project in Somalia. The US funder has separate funding commitments to each of WVA and the local NGO, requires each of them to cooperate and share and collate reports but there is no contractual relationship between WVA and the local NGO as such.

  As currently drafted, the local NGO is a "third party" of WVA with whom WVA is working. This is despite the fact that WVA has no contractual or other ability to monitor or supervise the local NGO.

- A registered entity donates funds to WVA for its work overseas in combatting poverty. A part of typical supporter engagement WVA provides this donor with project updates, the opportunity to have input into project focus areas, and the opportunity for representatives of the donor to visit projects (after appropriate safeguarding screening by WVA). Critically the relationship is typically broader than merely the financial aspects.

  As currently drafted, WVA is a "third party" of the donor. Depending upon what exactly is meant by "working with" a third party both the donor registered entity and the recipient registered entity are covered by the ECS. This is an unnecessary duplication and is contrary to red tape reduction objective of the ACNC Act.

- A registered entity undertakes independent monitoring of the conditions of asylum seekers held in offshore detention centres for the purpose of ensuring Australia meets its international humanitarian obligations. Monitoring is undertaken with the permission of the private operators of the facilities and the Department of Home Affairs. The registered entity meets with the private operator and Departmental representatives and provides confidential reports.

  As currently drafted, the registered entity has an "arrangement" with and is "working with" both the detention centre operator and the Department for the shared purpose of ensuring Australia meets its international humanitarian obligations. Accordingly, both the detention centre operator and the Department are "third parties" of the registered entity and so the registered entity is required, for example, to take reasonable steps to identify and document any perceived or actual material conflicts of interest with respect to those third parties under ECS 3.

WVA submits that the above examples – which are based upon actual situations – demonstrate that the current scope of the "third party" requirements are too broad.

This can be remedied, first, by narrowing the scope of the definition of third party to exclude other registered entities. This will mean that the regulatory burden will fall on the last Australian based "link" in the chain of entities – the registered entity which is actually transferring resources outside Australia.

Secondly, 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.

Recommendation 3

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

Broadly, proposed ECS 1 is intended to ensure that the registered entity has suitable procedures in place to manage the risks associated with its own operations and activities and to comply with applicable Australian laws.

In our view there is an overlap between the proposed standard and the requirements of the current Governance Standard 3 and s50.70(2) of the ITAA 97. In addition the recent ACNC Review Report concluded that:

> Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may 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. (Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, 2018)

Accordingly, WVA queries the policy basis or need for proposed ECS 1.

Recommendation 4

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

In addition, if subsection 50.20(4) is retained, it should be clarified to ensure that only applicable Australian laws are caught. We also recommend the list of topics in subsection 50.20(4) could be better clarified and should ideally refer to the actual relevant legislative provisions.

For example, do laws relating to "financing of terrorism" include only the express counter-terrorism financing provisions of the Criminal Code or is it intended to also capture provisions relating to "support" or "training" of a terrorist organisation? Do laws relating to "international sanctions" also include those relating to autonomous sanctions?

Finally, in subsection 50.20(5) it is unclear whether the provision is intended to capture actual expenditure or "expenditure" under applicable accounting standards.

Recommendation 5

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

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

3. Clarify whether the reference to "expenditure" in subsection 50.20(5) in intended to capture actual expenditure and expenditure under applicable accounting standards.

Minimising regulatory burdens

Proposed subsection 50-25(3) requires a registered entity to maintain records necessary to prepare an annual summary of its operations and activities outside Australia on a country by country basis (an "overseas activities statement") and under proposed subsection 50-25(4) a registered entity must include that statement as part of its annual information statement if the Commissioner requires (although the EM is drafted on the basis that the Commissioner "will" require this).

The subsection includes the following explanatory example (which is also contained in the EM):

> Example: Records should be obtained and kept about the following information:
> (a) the kinds of operations and activities that the registered entity conducted outside Australia;
> (b) details of how the registered entity's operations and activities outside Australia enabled it to pursue and achieve its purpose;
> (c) details of any procedures and processes that the registered entity used to monitor its overseas operations and activities;
> (d) a list of the third parties that the registered entity worked with outside Australia;
> (e) details of any documented claims of inappropriate behaviour by the registered entity's employees or responsible entities outside Australia, and subsequent actions taken by the registered entity as a result.

Duplicate reporting

WVA is concerned that this new requirement will impose significant additional costs and create duplication of reporting, noting that WVA already provides extensive reporting to DFAT and other donors for grant funded projects.

Similar to the "charity passport" approach encouraged by the ACNC as a way of reducing red tape, WVA believes more work is needed to avoid duplication of reporting.

At minimum we recommend that the proposed overseas activities statements need not include information about programmes and projects which are funded by DFAT and other government or multilateral agencies (Australian or international).

One size fits all approach

The stated policy basis for the proposed overseas activities statement is to assist "in meeting Australia's obligations under FATF Recommendation 8, in particular, for not-for-profit entities to issue financial statements that provide detailed breakdowns of incomes and expenditures, and have the capacity to provide timely information on its activities, size and other relevant features."(EM)

However FATF Recommendation 8 does not recommend a uniform one size fits all approach; in fact, making it clear that such an approach is "not appropriate":

> "Not all NPOs are high risk, and some may represent little or no risk at all. It may be possible that existing measures are sufficient to address the current TF risk to the NPO sector identified in a

country, although periodic reviews may identify new or evolved TF risks over time. This has important implications for both countries and financial institutions in their implementation of a risk-based approach, in line with Recommendation 1. In particular, it means that a "one size fits all" approach to all NPOs is not appropriate, either in terms of how countries supervise and monitor the sector, or how financial institutions manage business relationships with customers who are NPOs." (FATF, Best Practices: Combating The Abuse Of Non-Profit Organisations (Recommendation 8) June 2015)

Proposed subsection 50-25 does not take this risk based approach into account and imposes the same requirements regardless of whether the relevant overseas activities are conducted in fragile or conflict settings or indeed in more stable contexts.

Documented claims of inappropriate behaviour

Finally, the proposal that the records retained include "details of any documented claims of inappropriate behaviour" is highly problematic on many levels, including potential identification of whistleblowers and alleged victims inappropriately (illegally even), issues of confidentiality and potential claims for defamation where claims remain unsubstantiated or are disputed.

This is a really serious issue and deserves more attention and consideration than being listed as the last dot point to an example in the draft standards.

WVA believes the following issues need to be clarified in further consultation with the sector:

- What is meant by "documented claims"? Are all written allegations caught (even if unsubstantiated, spurious, or subject to investigation)? How are claims subject to Court proceedings, whistleblower protections or suppression orders to be reported?

- What is intended by "inappropriate behaviour"? Must the behaviour be illegal in Australia or in the relevant overseas country? Or would "anti-social" behaviour be caught? Must the behaviour occur in the course of employment or does the reporting requirement extend to behaviour outside work? What is the standard for "inappropriateness" (noting that while all organisations have their own codes of conduct, standards of behavior would differ)?

- How these details may be provided to the Commissioner while preserving confidentiality of and protecting whistleblowers and alleged victims and to minimise the risk of legal action.

Recommendation 6

1. Paragraph (e) of the "Example" in subsection 50.25(3) be deleted and the EM be updated accordingly.

2. There be further consultation with the sector on the issues around "documented claims".

Better defining reasonable steps and allowing for reasonable protections

Reasonable steps

Throughout the proposed ECS registered charities are required to use "reasonable steps" or "maintain reasonable internal control procedures" (s50-20(3), 50-30(3), & 50-35(3) and (4)).

Whilst the EM correctly acknowledges that "what is reasonable depends on the circumstances", this important qualification and guidance is not contained within the proposed standards themselves. In our view they should be.

This is very important not just for clarity but to properly recognize that what is reasonable steps would differ markedly in the broad range of circumstances in which organisations such as WVA works: fragile contexts, emergencies settings and conflict zones where the activity is short term and immediate, to stable contexts where long term development projects are viable.

Recommendation 7

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

Subdivision 45-C provides that a responsible entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties under section 45.25 if responsible entity meets a protection mentioned in that Subdivision.

WVA strongly recommends that the protections should also be available for the ECS. For example, if a registered entity has complied with DFAT's counter-terrorism or fraud reporting requirements then it ought to be able to rely upon that as sufficient reasonable steps to comply with the corresponding ECS.

Recommendation 8

Taking a similar approach to Subdivision 45-C, WVA recommends 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

Anti-fraud/corruption

Proposed 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)

In our view, the phrase "to minimise any risk" in the context of fraud, corruption etc would be better stated as "to mitigate the impact of risk" as what ought to be required is that the registered entity is required to take reasonable steps and precautions and implement appropriate procedures to report and investigate suspected cases. The language of minimising any risk suggests that what may be required is for the registered entity to avoid altogether conducting programs in fragile or conflict settings where these risks are heightened.

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

Recommendation 9

1. In subsection 50.30(3)(a), replace "to minimise any risk" with "to mitigate the risk".

2. Insert a definition of "material conflict of interest" for the purposes of subsection 50.30(3)(b).

Ensure the Safety

Proposed subsection 50.35(3) and (4) requires:

(3) 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:

(a) the registered entity; or

(b) a third party in collaboration with the registered entity.

(4) The registered entity must take reasonable steps to ensure the safety of vulnerable individuals outside Australia who have been engaged by:

(a) the registered entity; or

(b) a third party in collaboration with the registered entity

to provide services or benefits on behalf of the registered entity or the third party. (emphasis added)

Relevantly, it is proposed to amend Section 4 to include the following definitions:

child means an individual who is under the age of 18 years.

vulnerable individual means:

(a) a child; or

(b) an individual who is or may be unable to take care of themselves, or is unable to protect themselves against harm or exploitation.

Example: An individual may be unable to take care of, or protect, themselves by reason of age, illness, trauma or disability.

The stated objective of ECS 4 is as follows:

(1) The object of this ECS is to ensure that when a registered entity to which the standard applies operates outside Australia, it operates in a manner that *minimises the risk of abuse* to vulnerable individuals. (subsection 50.35(1))
(emphasis added)

However, the requirement "to ensure the safety of" is significantly more expansive than the stated object of seeking to "minimise the risk of abuse".

In many overseas aid and development contexts – which, for reasons beyond the control of registered entities such as armed conflict, disease, famine, deficient rule of law etc, may be inherently unsafe, a requirement to ensure the safety of vulnerable individuals is especially problematic. In particular:

- An assessment of what reasonable steps are required to ensure the safety of all individuals requires the registered entity to screen its potential beneficiaries to assess whether they are "vulnerable" and therefore adopt necessary precautions to ensure their safety. Requiring beneficiaries to disclose whether they have suffered trauma, or their illnesses is contrary to international humanitarian law and good practice;

- The safety needs of each individual will be different, although there may be recognisably similar risks across classes of individuals (for e.g. children). A registered entity may be able to assess the risks relating to classes of individuals and particular activities or programs, and then take reasonable steps to minimise those risks; however, a requirement to take reasonable steps to ensure the safety of each vulnerable individual where those safety needs will vary and may be unknown, and remain unknown, to the registered entity and will be impractical; and

- It is unclear to us whether the obligation "to ensure the safety of vulnerable individuals" would extend to matters such as a vulnerable individual's cultural, emotional, or psychological safety, as well as safety from risk of harm in relation to physical and sexual abuse – in our view the obligation is impractically open-ended.

The better (and more widely taken) approach, is for the requirement to focus on minimising the risk of abuse and exploitation by the registered entity or by third parties under its control or direction. This aligns with the stated objective of ECS 4 (in proposed subsection 50.35(1)) and also with the stated purposes in the EM:

> This ECS is intended to promote trust and confidence that while operating overseas, registered entities work to protect vulnerable individuals from abuse, as this would be consistent with community expectations of how registered entities should operate.
>
> This standard also assists in meeting Australia's obligations under the Convention on the Rights of the Child (CRC), the UN Guidelines for the Alternative Care of Children and the Convention on the Rights of Persons with Disabilities (CRPD).

Relevantly, both the CRC and the CRPD focus on protection from exploitation and abuse (CRC, Articles 19, 32, 34 & 36; CRPD, Article 16).

In this regard, WVA has had the opportunity to review a draft of the ReThink Orphanages Network Australia submission to Treasury with respect to the proposed ECS. WVA believes that submission is a highly useful contribution to highlight the complexities of the issues with respect to orphanage trafficking and exploitation. Accordingly, WVA strongly endorses that submission's call to align the regulation of charities overseas activities with key international instruments such as the CRC and the CRPD.

This approach is supported in the ACFID Code of Conduct, where the principle is expressed as "Development and humanitarian responses respect and protect human rights and advance inclusion" with the following as "commitments":

> "1. We respect and protect human rights.
>
> 2. We respect and respond to the needs, rights and inclusion of those are vulnerable and those who are affected by marginalization and exclusion.
>
> 3. We support people affected by crisis.
>
> 4. We advance the safeguarding of children."

Further, the Protection Principles under the SPHERE Humanitarian Principles (which are to inform all humanitarian action) are expressed as follows:

> "1. Avoid exposing people to further harm as a result of your actions.
>
> 2. Ensure people's access to impartial assistance- in proportion to need and without discrimination.
>
> 3. Protection people from physical and psychological harm arising from violence and coercion.
>
> 4. Assist people to claim their rights, access available remedies and recover from the effects of abuse."

Finally, the wording in proposed subsection 50.35(3), "vulnerable individuals outside Australia in relation to those individuals being provided with services or accessing benefits" is confusing. What is appropriate is that the registered entity's obligation should only extend to those vulnerable individuals who are benefit recipients (either directly or through third parties the registered entity controls or provides resources to). The concept of 'benefit recipients' is already used in governance standard 1 and so should also be used here for reasons of consistency.

Recommendation 10

Section 50.35(3) be amended by replacing "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" with "The registered entity must take reasonable steps to minimise the risk of abuse and exploitation of vulnerable individuals outside Australia who are benefit recipients of the registered entity or a third party acting on behalf of, or with resources from, the registered entity".

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If you have any queries regarding our submission, please contact Trinidad Wallace (General Counsel) (trinidad.wallace@worldvision.com.au).

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