Law Council
OF AUSTRALIA

Legal Practice Section

External conduct standards for charities registered with the Australian Charities and Not-for-profits Commission

The Treasury

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
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The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

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- Mr Geoff Provis

Acknowledgement

The Law Council is grateful to the Charities and Not-for-profits Committee (**the Committee**) of its Legal Practice Section for preparing this submission.

The Committee was established in March 2016 and comprises lawyers and academics with specific expertise in the area of the law of charity and associated tax concessions.

The objectives of the Committee include:

- to engage with financial accountability and taxation laws and policies that affect NFP organisations;
- to promote the administration of justice and the development and improvement of laws and policies affecting NFP organisations; and
- to contribute to the implementation of the Law Council’s International Strategy.

Introduction

1. At the outset, the Committee wishes to thank Treasury for the opportunity to comment on the draft External Conduct Standards (**Standards**)[1] for charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**). The Committee recognises the importance of the issues raised for consideration by the Standards.

2. The Committee submits that the Standards should be considered in context, and that the relevant context appears to the Committee as follows (listed in no particular order):

   (a) The Full Federal Court decision in *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 (**Hunger Project decision**), which has meant an increased number of Australian tax-deductible charities are operating overseas.

   (b) The disparity in the level of regulation between different types of not-for-profits that operate overseas – e.g. Overseas Aid Gift Deduction Scheme (**OAGDS**) organisations and Public Benevolent Institutions (**PBI**).

   (c) Public concern about terrorism, and what appears to be an increasing prevalence of terrorist attacks world-wide. Similarly, concern about money-laundering, human trafficking, sexual offences against children, modern slavery and trafficking in individuals and debt bondage, people smuggling and bribery.

   (d) Community expectations that not-for-profits will ensure that children and other vulnerable people within their care are safe.

   (e) The findings by the Review Panel published in *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (**ACNC Review**).[2]

   (f) The ACNC's object of maintaining, protecting and enhancing public trust and confidence[3] – which carries with it an expectation that the ACNC will prevent charities from engaging in unlawful conduct.

   (g) The ACNC object of supporting and sustaining a robust, vibrant, independent and innovative sector.[4] Implicit in this is recognition of the invaluable work that Australian not-for-profits do, both in Australia and overseas, which should not be unduly stifled.

   (h) The ACNC object of reducing unnecessary regulatory obligations.[5] Charitable resources are precious and need to be utilised effectively. The public expects donations to go directly to the cause, and high administration costs undermine public trust and confidence in the Sector (regardless of the merits of such a view, it is clearly prevalent). The greater the compliance burden on an entity,

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[1] Exposure Draft, Australian Charities and Not-for-profits Commission Amendment Regulations (No 2) 2018 <https://treasury.gov.au/consultation/c2018-t317739/>.
[2] Australian Charities and Not-for-profits Commission Legislation Review Panel, The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (2018) <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>.
[3] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15.5(1)(a) ('*ACNC Act*').
[4] Ibid s 15.5(1)(b).
[5] Ibid s 15.5(1)(c).

the higher the administrative costs. It is important therefore that any regulation is necessary and proportionate to risk.

(i) Many not-for-profits operate in an environment where their staff and volunteers face high levels of personal risk. For example, where failure to understand or comply with local laws or customs can result in staff or volunteers being imprisoned or killed, or where disease or civil war are prevalent.

3. The Committee acknowledges that the Standards play an important role in enabling the ACNC to address the potential for misconduct by charities by providing:

   (a) a prompt for charities to ensure they identify and manage risks; and

   (b) triggers for the ACNC to exercise its enforcement powers, or revocation of registration, in the event of misconduct.

4. However, the Committee is concerned that the Standards may not presently strike the right balance between achieving these objectives, and other relevant objectives.

5. The Committee has set out below a number of recommendations in relation to the Standards. These are intended to assist in ensuring that the Standards appropriately balance and reflect all of the relevant objectives.

6. In particular, the Committee submits that further work is needed to ensure that the Standards are necessary and proportionate to the risk, so that charitable resources are utilised effectively.

Targeting risk

7. The Committee is concerned that the Standards are not appropriately targeted to risk, and that this will increase charities' administrative costs disproportionately.

8. There appears to be an assumption that operating overseas carries with it a higher risk of misconduct that needs to be addressed through the Standards.

9. The Committee submits that this assumption may not be correct. There will be many charities whose overseas activities pose no greater risk than other charities operating solely in Australia. Examples could include:

   (a) charities that do not work with vulnerable people, and do not work in geographical locations or in sectors that pose risks relating to terrorism, money laundering, human trafficking or similar;

   (b) an Australian charity that has a purpose of promoting Australian indigenous music in North America; or

   (c) an Australian charity that has a purpose of promoting the advancement of medical research in a particular field by facilitating collaboration between leading researchers and facilities around the world.

10. There are also charities that may pose a higher degree of risk in one area (e.g. child protection) but not another area (e.g. money laundering). Consider, for example, an Australian charity that facilitates educational trips for families of all ages to New Zealand to promote the protection of the environment.

11. Charities that are subject to the Standards will all have an increased compliance burden, regardless of the level and type of risk. At a minimum, charities subject to the Standards will need to:

    (a) obtain legal advice on a range of complex laws such as money laundering and international sanctions;

    (b) undertake a risk assessment and put in place policies, procedures and training in relation to those risks and obligations in order to demonstrate compliance with the Standards; and

    (c) Regularly review and update the various policies and procedures.

12. The extent of the compliance burden already borne in the Sector should not be underestimated. Board members, many of whom are volunteers, are required to ensure their organisation is compliant with a range of laws. These include occupational health and safety, superannuation and taxation, financial reporting, privacy, employment and anti-discrimination, child safety and fundraising laws, among others. It is a daunting task, and many volunteers devote substantial time to it, often late at night and on weekends. In these circumstances, additional regulation should only be introduced where it warranted by the risk, and where it is proportionate.

13. The ACNC Review notes that the Australian Criminal Intelligence Commission (**ACIC**) has found that 'proven instances of money laundering and terrorism financing in this sector remain low'. [6]

14. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) advised the ACNC Review Panel that the economic value of suspected terrorism financing involving charities or not-for-profits is low compared with the economic size of the sector. The ACNC Review concluded that 'this highlights the importance of identifying and targeting the subset of high risk entities, rather than the whole sector'.[7]

15. ACIC recommended to the ACNC Review Panel that a new regulatory model is adopted based on risk rather than size: [8]

    > *A regulatory framework that is based on a charity's risk profile would offer policy responses with greater flexibility in application and reduce the impact on the areas of the sector with lower risks. A sector specific risk-based regulatory model would identify high risk charities based on specific risk indicators such as high-risk financial transactions operating in locations with proscribed terrorist organisations, and other criminal related risks such as fraud and money laundering. These risk indicators would inform the charity's risk rating and determine the regulatory and compliance regime for the charity and its activities.*

16. Risk characteristics identified in the Report include the presence of proscribed terrorist organisations in the country of operation, recent terrorist attacks and close proximity to conflict zones or political and economic instability. AUSTRAC also

[6] Australian Charities and Not-for-profits Commission Legislation Review Panel, The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (2018) 85 <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>.
[7] Ibid 86.
[8] Ibid 86-7.

recommended higher reporting obligations on charities that send money to countries listed on the DFAT sanctions list. [9]

17. The Committee concurs with the recommendations in the ACNC Review, that a new risk-based regulatory model should be adopted that enables high risk charities to be identified based on specific risk indicators.[10] The Committee submits that working with vulnerable people should also be recognised as a relevant risk.

18. In the opinion of the Committee, this would mean that:

    (a) An entity should not be subject to all of the Standards merely because it operates overseas.

    (b) An entity should only be subject to a Standard where it has an identifiable risk, and the Standard is specifically targeted to that risk.

    (c) Even if an entity is not subject to an External Conduct Standard, it will still be subject to all of the existing Australian laws relating to counter-terrorism, money-laundering, anti-slavery and so forth. It will also be subject to the powers of the government agencies responsible for policing those laws, in the same way that individuals and businesses are.

    (d) This approach would also enable the ACNC to concentrate its resources where they are likely to be most effective.

19. The Committee also notes the finding of the ACNC Review Panel, that counter-terrorism is not a core function of the ACNC.[11] The Committee submits that the resources of the ACNC should be focused on the protection of charitable assets as distinct from broader criminal regulatory activities for which there are already other relevant government agencies.

20. The Committee also notes that the level of risk of counter-terrorism and money laundering in the superannuation industry is comparable to that within the not-for-profit sector. It is not clear to the Committee why there should be a more onerous expectation on the not-for-profit sector when it is altruistically motivated and has limited resources, as compared to the superannuation industry.

    (a) In 2016, AUSTRAC assessed the overall money laundering and terrorism financing risk for the superannuation sector as medium.[12] This is the same level of risk assessed within the not-for-profit sector.[13]

    (b) Whilst trustees of superannuation funds are required to comply with money-laundering and counter-terrorism finance law, this obligation is not expressly included in the *Superannuation Industry (Supervision) Act 1993* (Cth). Rather, under superannuation law, trustees are required to have appropriate risk

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[9] Ibid.
[10] Ibid 86.
[11] Ibid 87.
[12] Australian Transaction Reports and Analysis Centre, *Australia's Superannuation Sector: Money Laundering and Terrorism Financing Risk Assessment* (July 2016) 4 <http://www.austrac.gov.au/sites/default/files/super-annuation-risk-assessment-WEB2.pdf>.
[13] The joint ACNC and AUSTRAC review released in August 2017 found that the risk level for both money laundering and terrorism financing is 'medium': see ACNC and AUSTRAC, 'ACNC and AUSTRAC: Strengthening NPOs against money laundering and terrorism financing' (Media Release, 28 August 2017) <http://www.austrac.gov.au/media/media-releases/acnc-and-austrac-strengthening-npos-against-money-laundering-and-terrorism>.

management and compliance frameworks that address their broader legal duties.

Compliance with Australian laws

21. Draft section 50.20(4) requires compliance with a range of Australian laws. The Committee is concerned that this is the approach that is taken in Governance Standard 3 (compliance with Australian laws), which the ACNC Review has recommended for repeal.

22. The ACNC Review Panel found 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.*[14]

23. The Committee is also concerned that a legitimate charity, with appropriate internal controls and procedures, could still unwittingly be found to infringe one of the stated laws and thereby be in breach of the Standards due to the (unsanctioned) misbehaviour of a rogue employee, volunteer or board member. The Standards expressly require that a registered entity must comply with the named laws, in addition to having appropriate internal controls and procedures. The result is that a legitimate registered charity as a whole may be penalised for the misconduct of one individual associated with it.

24. In the opinion of the Committee, this presents a risk to public trust and confidence, particularly for innocent third-party donors who may find themselves no longer entitled to a tax deduction after a gift has been made.

25. The Committee does not consider it necessary to restate in the Standards an obligation to comply with laws that already exist, which a registered entity is already bound to comply with and which another regulatory agency is already bound to enforce compliance with.

26. If, notwithstanding this submission, it is determined to maintain this approach, the Committee submits that, at the very least, specific laws ought to be named in the Standard, rather than general topics. This would assist greater compliance.

27. The approach to listing general topics rather than specific Acts of Parliament also seems to be inconsistent with the approach taken to compliance in other regulatory regimes.

    (a) For example, superannuation trustees that hold an Registrable Superannuation Entity (**RSE**) Licence are required to comply with 'RSE licensee laws' which are defined in section 9 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) by reference to specific legislation and not to a broad requirement of 'superannuation law'.

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[14] Australian Charities and Not-for-profits Commission Legislation Review Panel, The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (2018) 47 <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>.

(b) Similarly, holders of an Australian Financial Services Licence (**AFS Licence**), which typically captures most operators in the financial services including banks, insurance companies, super trustees, operators of managed investment schemes etc, are required to comply with ‘financial services laws’ which are defined in the *Corporations Act* 2001 (Cth) by reference to specific legislation (see section 9 and regulation 7.6.02A).

Risk management approach

28. An alternative approach may be to introduce Standards that require affected charities to enhance their risk management arrangements.

29. That is, rather than imposing an obligation to comply with a broad basket of laws, perhaps a more effective approach may be to provide guidance on how to approach risk management.

30. The Committee notes by way of observation that superannuation fund trustees are also required to have a risk management framework through the Superannuation Prudential Standard and associated guidance (SPS 220 Risk Management) which is defined as follows (emphasis added):

> *… the risk management framework is the totality of systems, structures, policies, processes and people within an RSE licensee’s business operations that identify, assess, manage, mitigate and monitor all internal and external sources of inherent risk that could have a* ***material impact*** *on the RSE licensee’s* ***business operations*** *or the interests of beneficiaries (material risks).*[15]

31. The Australian Prudential Regulatory Authority (**APRA**) Prudential Standards (which have the force of law under the SIS Act and enable the regulator, APRA, to set the standards) prescribe certain minimum requirements such as having a business plan, risk appetite statement and a risk management plan. The cumulative effect of these requirements is that compliance with non-super specific laws, such as money laundering and counter-terrorism financing laws, is captured through the risk management framework.

32. The Committee is not suggesting that wholescale adoption of the approach taken to regulation of superannuation funds is appropriate. Rather, the Committee is suggesting that developing a Standard that assists registered entities to put in place appropriate risk management frameworks may be more effective. Further consideration of what that might look like is needed, including further public consultation.

[15] Australian Prudential Regulation Authority, *Prudential Standard SPS 220 Risk Management* (2012) 6.

Anti-fraud and anti-corruption

33. Draft section 50.30(3)(b) requires a registered entity to identify and document any *perceived* or actual material conflicts of interest for their *employees, volunteers, third parties* and responsible entities outside Australia.

34. The Committee recommends the removal of the word ‘perceived’ on the basis that it is not clearly established in law and is capable of varied interpretation. The ACNC Review Panel recommended that the word ‘perceived’ also be removed from Governance Standard 5.

35. The Committee is concerned by the extent of the obligation placed on a registered entity to identify and document perceived or actual material conflicts of interest. It extends to employees, volunteers and third parties. The scope of the networks that global organisations operate through are extensive, and this represents a significant administrative burden, particularly because the definition of ‘third party is so broad. It includes an entity that a registered entity has ‘some form of … association’ with.

36. The Committee recommends that the Standards are revised to more appropriately target risk. This could be done, for example, by requiring documentation of conflicts of interest for people who make procurement decisions above a certain threshold, or who have access to the organisation’s bank accounts or similar.

Tracing

37. Draft section 50.20(3)(c) appears to impose a tracing requirement. That is, an obligation on a registered entity to trace the use of funds given to third parties. It states:

> *A registered entity must take reasonable steps to ensure that the resources (including funds) given to third parties outside Australia (or within Australia for use outside Australia) are applied:*
>
> (i) in accordance with the entity’s purpose and character as a not-for-profit entity; and
>
> (ii) with reasonable controls and risk management processes in place.

38. Third party is defined broadly:

> *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.*

39. This represents a departure from the common law position, which is set out in *Inland Revenue Commissioners v Helen Slater Charitable Trust* [1981] 3 WLR 377, 382 (Court of Appeal). The Committee notes the following statement by Lord Justice Oliver (emphasis added):

> *The Crown’s proposition is a startling one; it involves this, that the trustees of a grant-making charity, although they may discharge*

themselves as a matter of law by making a grant to another properly constituted charity, are obliged, if they wish to claim exemption under the subsections, to inquire into the application of the funds given and to demonstrate to the Revenue how those funds have been dealt with by other trustees over whom they have no control and for whose actions they are not answerable. ***Anything more inconvenient would be difficult to imagine …***

40. There is no exemption to the tracing requirement in Standard 1, even where a registered entity distributes to another registered entity. That is, under the terms of Standard 1, a registered entity in Australia (A) who distributes to another registered entity in Australia (B) is not entitled to presume that (B) has appropriate controls in place but must in fact take steps to assess the internal controls and procedures in (B). This does not appear appropriate or necessary. It also departs from the approach taken in Standard 2. Draft section 50.25(3) provides an exemption for third parties that are registered entities. It is not clear why a different approach to third parties is necessary in Standards 1 and 2. In the Committee's view they ought to be consistent.

41. There is also a significant impact for organisations that distribute to non-registered entities, even where they are legitimate charities. Difficulties associated with tracing have previously been raised in submissions in relation to drafts of the proposed 'in Australia' legislation; the Committee is concerned that there may be unintended consequences and recommends that consideration is given to revising this Standard.

42. The Committee notes that:

(a) an entity will only qualify as a 'charity' if uses its assets for its charitable purposes and not for other purposes (save for incidental or ancillary purposes) and

(b) responsible persons are subject to duties of due care and diligence at common law and in equity, as well as in a range of statutes. Failure by a governing body to have appropriate procedures and controls may constitute failure in that regard.

43. In these circumstances, it is not clear to the Committee that an express tracing requirement is necessary, particularly given the evident impost of it. The Committee submits that a focus on ensuring that responsible persons exercise care and diligence may be a preferable approach.

44. The Committee also considers that there would be substantial benefit in educative material from the ACNC to assist responsible persons to understand how to exercise care and diligence. In the overseas context, there are a range of challenges, such as:

(a) language and cultural differences which hinder clear communication;

(b) identifying what questions need to be asked to appropriately screen individuals and organisations as suitable in-country partners or suppliers;

(c) identifying whether answers to screening questions are in fact truthful and fulsome, or whether the charity is being misled; and

(d) developing screening and accountability procedures that do not exclude the opportunity of individuals with little business acumen, who may not have access to bank accounts or other institutions of business that make it easier to satisfy tracing requirements.

Reporting

45. Standard 2 introduces new record keeping and reporting requirements. They require a registered entity to obtain documents (from third parties) to prepare a summary of its operations and activities outside Australia on a country by country basis. It must keep records of its expenditure on a country-by-country basis.

46. Many organisations that operate overseas do so through global networks, and so reporting in this regard is not straight forward. The Committee is concerned that it may result in misrepresentations on the register, depending on how many steps in the transactions are reported.

47. Consider, for example, an Australian charity (A) who raises funds and pays them to the international headquarters in the United States (B), who then:

    (a) disburses funds to the Canadian country office (C) for the work that office is doing in Bolivia (D);

    (b) disburses funds to the New Zealand country office (E) for the work that office is doing in Papa New Guinea (F); and

    (c) holds and invests a portion until such time as it can be expended on a project in Uganda (G).

Comparable regulatory regimes

48. The Committee acknowledges that there is inequity in the level of regulation across different types of charities at present. Compare for example overseas aid entities that are subject to the Australian Council for International Development (**ACFID**) Code of Conduct and PBIs that are not.

49. The Committee is of the opinion that organisations that present similar risks should be subject to the same regulations, and that the regulation should be proportionate, necessary and targeted to the risk.

50. The Committee is also cognisant that the Standards operate as an additional layer of regulation. They do not appear to account for other comparable standards which entities may already comply with and which may well be adequate to the level of risk that the organisation presents – for example, the ACFID Code of Conduct and also government funding contracts and conditions within those. There are no doubt also regulatory standards in other countries, which third parties will be subject to.

51. If a registered entity is meeting a comparable standard, then it is not clear to the Committee why it is also necessary to then meet the additional requirements set out in the Standards.

52. The Committee notes the response provided in the FAQs document circulated as part of the consultation.

53. However, the Committee recommends consideration be given to including an exception in the Standards that recognises adherence to comparable standards (whether Australian or otherwise) as an acceptable alternative, for the reasons set out in this submission.

54. The Committee expects that this would significantly reduce the administrative burden in cases where, for example, an entity operates as part of a global network and the global network has appropriate procedures in place.

Interpretation

55. The Committee acknowledges the direction in draft section 50.2 that the Standards must be interpreted in a way that is consistent with the objects of the *Australian Charities and Not-for-profits Commission Act* (Cth) (**ACNC Act**), and the requirements of section 15-10 of that Act.

56. However, it is the opinion of the Committee that this is insufficient direction to lessen the impact of the plain terms of the Standards. Further, the Committee notes that the matters the Commissioner is directed to have regard to in section 15-10 are many and varied in their own right and it does not necessarily follow that they will result in a more lenient approach being taken than the words of the Standards themselves require.

Religious charities

Missionaries

57. The Standards may have a significant impact on religious charities, particularly in the area of the support of missionaries overseas:

(a) Many, if not most, Churches will provide financial and other support to missionaries. Frequently, those missionaries will be longstanding members of the congregation, and other members of the congregation (friends, family, etc) provide financial support to meet the missionaries' cost of living.

(b) There are also dedicated missionary organisations which utilise a range of models to train and support missionaries. These include prescribed institutions under section 50.50(1)(d) of the *Income Tax Assessment Act 1997* (Cth), and their members.

(c) The tracing obligations in this context may be complicated, with consequently high administrative costs, and which in turn will be overly burdensome in a context where the missionaries often fundraise on an individual basis to support their own (basic and minimal) costs of living in a developing country.

(d) If a potential consequence of the Standards is that many religious organisations will cease to be able to do missionary work, this is contrary to the ACNC's object of supporting and sustaining the Sector. It may also be seen as having potential political implications.

(e) The annual reporting of activities on a country by country basis may also present particular risks for religious organisations and their staff. There are countries where association with a particular religion can lead to imprisonment, death, expulsion from the country or targeted violence.

58. The Committee notes this as one area where further consultation should be undertaken prior to the content of the proposed Standards being settled, to avoid any unintended consequences.

(a) The Committee is conscious that the timeline for consultation on the Standards so far has been relatively short (6 weeks).

(b) It is not clear to the Committee the extent to which the information regarding the proposed Standards has filtered down into the Sector to enable an appropriate level of feedback about what the implications will be for religious organisations engaged in missionary and other overseas work.

Basic religious charities

59. Basic religious charities (**BRCs**) will be subject to the External Conduct Standards. They are not subject to the Governance Standards. As a result, the introduction of the Standards will mean that, for the first time, BRCs will be subject to some financial reporting obligations (under Standard 2). The Committee notes that BRCs may need assistance from the ACNC to enable them to comply. Educative material from the ACNC and a transition period may be of assistance.

Constitutional issues

60. It was reported to the ACNC Review Panel that the purpose of exempting BRCs from the Governance Standards was to avoid any potential issue arising under section 116 of the Constitution:

> *The Australian Catholic Bishops Conference advised the Panel that their understanding was that the ACNC Bill was redrafted to avoid constitutional difficulties exposed in the first draft of the ACNC Bill. The exercise of any powers of the ACNC to replace and appoint responsible persons in religious registered entities or to direct religious registered entities to alter governance rules and structures could have been subject to constitutional challenge.*[16]

61. The Committee recognises that the external affairs power in section 51(xxix) of the Constitution of Australia is likely to be applicable to support the Standards.

62. However, the Committee notes one aspect of Standards that (by its express terms) has no particular connection to overseas activities or functions. Draft section 50.20(3)(b), by its terms, is not limited in any way to overseas activities or functions. It requires a registered entity to maintain reasonable internal control procedures to ensure that its resources are used in a way that is consistent with its purpose and character as a not-for-profit entity.

63. The Committee raises for consideration whether this provision ought to be more directed and refined in its scope to overseas related matters to avoid a constitutional law issue, or the appearance of trying to circumvent the basic religious charity exemption from the Governance Standards.

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[16] Australian Charities and Not-for-profits Commission Legislation Review Panel, The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (2018) 68 <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>.

DGR Reform

64. The Committee notes that further guidance on the interaction between the proposed DGR reforms and the Standards may be necessary, to ensure there is clarity about whether or when non-charitable DGRs that have been migrated across will be subject to the Standards.

Conclusion

65. The Committee acknowledges the intent of Standards and affirms the importance of ensuring that Australian charities are complying with Australian laws and preventing the misapplication of assets.

66. However, the Committee is concerned that the Standards have not struck an appropriate balance between achieving those objectives and ensuring the effective use of charitable resources.

67. The Committee is mindful that compliance with the relevant laws is necessary for every person and every organisation in Australia, and there are already regulatory agencies. To the extent that additional regulation is needed for charities, it should be justified by reference to the level of risk, and be necessary and proportionate.

68. In the opinion of the Committee, the Standards impose a significant additional administrative burden on charities, beyond what is required of other organisations in Australia that present a comparable level of risk.

69. Charitable resources are precious and there is a public expectation that they will be used for the cause, and that administrative expenses will be kept to an absolute minimum. Overly high administration costs have the effect of undermining public trust and confidence in charities, which is contrary to the aim of the Standards.

70. The Committee has therefore made a number of recommendations in this submission to ensure that charities resources are used effectively, and that public trust and confidence is not undermined by incurring disproportionately high administrative expenses. The Committee thanks the Treasury for the opportunity comment.

Contact

71. For further comment or clarification on any of the matters raised in this paper please contact Jennifer Batrouney QC, Chair, Charities and Not-for-profits Committee on (T) 03 9225 8528 or at (E) Jennifer_batrouney@vicbar.com.au.