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## **Submission to the Treasury regarding the Consultation Paper *Development of Governance Standards for the Not-for-profit Sector* December 2012**

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

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### **1 Introduction**

- (a) The name of our organisation is the Anglican Church Diocese of Sydney. This submission is made by the Standing Committee of the Synod of the Diocese.
  - (b) We welcome the opportunity to make submissions on the Consultation Paper *Development of Governance Standards for the Not-for-profit Sector* December 2012 (the Consultation Paper).
  - (c) Our contact details are –  
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### **2 Differential application of Governance Standards**

- (a) We set out below our specific comments on each of the proposed Governance Standards. We also propose an additional Standard 7 which would require large registered entities to consider positively the collective skills and experience of its responsible entities.
- (b) However in order to balance the object of the Act to maintain, protect and enhance public trust and confidence in the sector with the further object to promote the reduction of unnecessary regulatory obligations for the sector, we consider there would be merit in providing for the differential application of standards depending on whether an entity is small, medium or large. We consider that differential application of standards according to size would not only ease concerns about additional and, possibly, unnecessary red tape in complying with the standards but would also be a more targeted and proportionate response in addressing the need to maintain, protect and enhance public trust and confidence in the governance of registered entities.
- (c) We therefore recommend that –
  - Standards 1, 2, 3 and 4 should apply to all registered entities
  - The application of Standards 5 and 6 should be limited to medium and large registered entities.
  - The new “skills matrix” Standard 7 we propose below should be limited to large registered entities.

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### 3 Comments on Governance Standards

#### 3.1 Standard 1 – purposes and NFP nature of a registered entity

The object of the standard expressed in subsection (1) should align with the standard itself expressed in subsection (2). As presently drafted this is not the case.

We therefore recommend that the words “acting to further its purposes” in paragraph (1)(b) be deleted and the words “complying with its purposes and its character as a not-for-profit entity” be inserted instead.

#### 3.2 Standard 2 – accountability to members

We have no comment in relation to this standard.

#### 3.3 Standard 3 – compliance with Australian laws

We note the comment made in the last paragraph on page 15 of the Consultation Paper that a registered charity would be in breach of this standard if, for example, the Commissioner reasonably believes that a charity has engaged in an offence of fraud.

We do not think this statement is strictly correct. A determination of whether a registered charity has engaged in conduct which may be dealt with as an indictable offence or by way of civil penalty of 60 penalty units or more and therefore constituting a breach of the standard is ultimately a matter that can only be decided by the courts. However the Commissioner does have certain enforcement powers under Part 4-2 of the Act that can be exercised if the Commissioner reasonably believes that a registered charity has not complied or is likely not to comply with a governance standard.

In order to provide clarity concerning this issue, we recommend that Note 2 under the standard be recast as follows –

Note 2 While a registered entity must comply with all Australian laws, this standard enables a serious infringement of an Australian law covered by this standard may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the Act following consideration of the matters mentioned in subsection 35-10(2) of the Act, if he or she reasonably believes that a registered entity has committed a serious infringement of an Australian law covered by the standard or that such an infringement is more likely than not to occur.

#### 3.4 Standard 4 – responsible management of financial affairs

We have no comment in relation to this standard.

#### 3.5 Standard 5 – suitability of responsible entities

(a) We consider that this standard as currently drafted will be very problematic in its application. Our central concern is the potential for a significant increase in red tape and cost that will be involved in undertaking the necessary searches and obtaining the necessary declarations to ensure that reasonable steps have been taken to check that persons are not disqualified from holding office as a responsible entity.

(b) We consider that the following changes to the standard should be made to ensure the standard establishes minimum requirements necessary for an entity to remain registered with the ACNC and not “best practice governance” (see comments made in first and second paragraphs of page 6 of the Consultation Paper) –

(i) As indicated above, the application of the standard should be limited to medium and large entities only.

- (ii) Appropriate steps should be taken to ensure that any search that needs to be undertaken to ascertain whether a person is listed as disqualified should be capable of being undertaken on a single register maintained by the ACNC Commissioner. These steps should be taken before this standard comes into force. At present the Consultation Paper suggests that searches may need to be done on the register maintained by ASIC and also a separate register to be maintained by the ACNC Commissioner. Since both these registers are or will be established under Commonwealth law, it is contrary to the objects of the Act not to consolidate these registers or at least to provide the capacity to undertake a single search across both registers to obtain the necessary information. For the purposes of the remaining comments on this standard, this single/consolidated register will be referred to as the “Disqualified Responsible Entities Register”.
  - (ii) Subsection (2)(a) of the standard should be redrafted to require a registered charity to undertake a search on the Disqualified Responsible Entities Register as soon as reasonably practicable before a person is proposed to become a responsible entity or, if not reasonably practicable to do so before, as soon as reasonably practicable after a person becomes a responsible entity. The capacity to undertake a search after a person becomes a responsible entity is important in some circumstances. An example would be the election of a person as a responsible person who has been nominated from the floor of the AGM of the registered charity. This is a fairly common occurrence for many charities when seeking persons, usually volunteers, to act as their responsible persons. Furthermore, the standard should not go beyond the requirement to undertake a register search. In particular the standard should not also impose on a registered charity an obligation to obtain declarations concerning a person having a disqualified status in addition to undertaking a register search. Accordingly, we recommend that paragraph 2(a) of the standard be redrafted as follows –
    - 2(a) A [medium or large] registered entity must, as soon as reasonably practicable before a person is proposed to become a responsible entity or, if not reasonably practicable before, as soon as reasonably practicable after a person becomes a responsible entity, undertake a search on the Disqualified Responsible Entities Register.
  - (iii) Any requirement to take reasonable steps to prevent a person becoming a responsible entity or to remove a person as a responsible entity should only be triggered if the registered entity becomes aware of the disqualification (whether through a register search or otherwise) and should not be dependant upon the registered entity taking ongoing steps to monitor whether a responsible entity becomes disqualified. Accordingly, we recommend that paragraph 2(b) of the standard be redrafted as follows –
    - 2(b) A [medium or large] registered entity must, if it becomes aware that a person does not or ceases to meet the conditions mentioned in subsection (3), take reasonable steps to ensure that the person either does not become or is removed, as a responsible entity, as the case may be.
  - (iv) Any power of the ACNC Commissioner to disqualify a person from being a responsible entity should be provided under the ACNC Act itself and not under the standard. Accordingly subsections (4) to (6) of the standard and the associated subsections (1) to (3) concerning the Register of disqualified responsible entities should be omitted from the standard and enacted as part of the Act.
- (c) We also think the object of the standard should be more specifically tied to its intended purpose. Accordingly we consider that the object in subsection (1) should be redrafted as follows –

- (1) The object of this governance standard is to ensure that unsuitable persons are not involved in the governance of [medium and large] registered entities.
- (d) Finally, we note this standard approaches the criteria for suitability in wholly negative terms. We address this issue in the context of an additional Standard 7 which is proposed below.

### **3.6 Standard 6 – duties of responsible entities**

- (a) As indicated above, we consider that the application of this standard should be limited to medium and large registered entities.
- (b) We do not think that the reference to “fiduciary relationship” in subparagraph 1(a)(i) of the standard is appropriate. A fiduciary relationship is the highest possible standard of duty. As indicated above, the governance standards are not aimed at setting the highest possible standard but minimum requirements with which registered entities need to comply in order to maintain registration.
- (c) More generally, we consider that subsections (3) to (5) of the standard and also the Draft Protections are over-engineered compared with the approach taken, for example, in Standard 4 which expresses responsible management of financial affairs at an appropriately high level of principle. We consider that Standard 6, as currently drafted, does not reflect the object of the Act to promote the reduction of unnecessary regulatory obligations for the sector.
- (d) We therefore recommend that the matters addressed in subsections (3) to (5) of the standard and the Draft Protections be omitted from the standard with a view to these matters being dealt with in the form of guidance issued by the ACNC as to what constitutes “reasonable steps” for the purpose of complying with the duties set out in subsection (2) of the standard.

### **3.7 Additional Standard 7 – skills and experience of responsible entities**

- (a) We consider that it would be appropriate to introduce an additional Standard 7 which should apply only to large registered entities. The additional Standard 7, which balances the negative approach for determining the suitability of responsible entities under Standard 5 (disqualification of persons), should be along the following lines –

A large responsible entity is to take reasonable steps to ensure that the collective skills and experience of its responsible entities are adequate having regard to the purposes and activities of the registered entity.

- (b) This is essentially a requirement for a skills matrix.

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## **4 Further discussion**

We would be happy to discuss the matters raised in this submission further.

14 February 2013