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Australian Charities and Not-for-profits Commission Act 2012

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) provides for the registration and regulation of charities by the Australian Charities and Not-for-profits Commission (ACNC).

Section 200-5 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) is to ensure registered entities are governed in a way that enables them to be accountable for past conduct relating to institutional child sexual abuse.

To achieve this, the Regulations prescribe a new governance standard for the purposes of subsection 45-10(1) of the Act, which requires registered entities to take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) if the entity is, or is likely to be, identified as being involved in the abuse of an applicant for redress under the Redress Scheme.

The Redress Scheme was established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* on 1 July 2018 in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse. Under the Redress Scheme, survivors of institutional child sexual abuse may receive redress in the form of:

- a redress payment of up to \$150,000;
- counselling and psychological care; and
- an optional direct personal response from the responsible participating institution.

The Redress Scheme operates on an opt-in basis, where responsible participating institutions are liable to pay their share of the costs of redress payments and counselling and psychological care.

Survivors of institutional child sexual abuse cannot obtain redress under the Redress Scheme if none of the institutions responsible for their abuse have joined the Redress Scheme. If there are multiple responsible institutions involved and only some of those institutions have joined the Redress Scheme, the survivor may not be able to obtain the maximum amount of redress that would otherwise be available if all of the responsible institutions had joined the Redress Scheme.

The issue of institutions failing to join the Redress Scheme was recognised in a report by the Joint Select Committee overseeing the implementation of redress related

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recommendations of the Royal Commission into Institutional Child Sexual Abuse, *Getting the National Redress Scheme right: An overdue step towards justice*, tabled in Parliament on 2 April 2019.

Recommendation 3 of that report recommends the government consider mechanisms and their efficacy, including those available under the *Charities Act 2013*, to penalise all relevant institutions that fail to join the Redress Scheme. This includes the suspension of all tax concessions for, and the suspension of charitable status of, any institution that could reasonably be expected to join the Redress Scheme.

On 22 October 2020, the Prime Minister announced in his speech to Parliament that the Government was finalising sanctions for institutions that continue to refuse to join the Redress Scheme, including the withdrawal of their charitable status.

The Regulations form part of the Government's response to this issue, as a failure to comply with the new governance standard means that an entity is not entitled to be registered under the Act. As a result, the ACNC Commissioner may revoke the entity's registration (that is, the entity's charitable status), which could cause the entity to lose access to certain government funding, exemptions, concessions and benefits. This is consistent with the consequences that currently apply if a registered entity fails to comply with the existing governance standards in the *Australian Charities and Not-for-profits Commission Regulation 2013*.

Details of the Regulations are set out in the [Attachment](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day for commencement specified in section 45-20 of the Act. That is, the day after the earlier of:

- the day both Houses of the Parliament pass a resolution approving the standard; or
- the last day on which the standard could be disallowed in either House (which is a 15 sitting day disallowance period) unless the Regulation is disallowed or either House passes a resolution disapproving the Regulation before that day.

Details of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021*

Section 1 – Name

The name of the instrument is the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

Section 2 – Commencement

The Regulations commence on the day for commencement specified in section 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012*. That is, the day after the earlier of:

- the day both Houses of the Parliament pass a resolution approving the standard; or
- the last day on which the standard could be disallowed in either House (which is a 15 sitting day disallowance period) unless the Regulation is disallowed or either House passes a resolution disapproving the Regulation before that day.

Section 3 – Authority

The Regulations are made under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Section 4 – Schedule

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 adds new definitions of terms which are used in the new governance standard. This includes the definition of ***abuse, participating non-government institution*** and ***sexual abuse***. These definitions have the same meaning as in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Redress Act).

Item 2 inserts section 45.30 in the *Australian Charities and Not-for-profits Commission Regulation 2013*. Section 45.30 sets out new governance standard 6.

The standard

Governance standard 6 only applies to a registered entity that is, or is likely to be, identified as being involved in the abuse of a person, either:

- in an application for redress made under section 19 of the Redress Act; or
- in information given in response to a request made under section 24 or 25 of the Redress Act.

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The new governance standard requires these registered entities to take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) by becoming participating non-government institutions.

Which registered entities are affected?

Officers of the Redress Scheme primarily obtain information about whether a particular entity may be responsible for abuse of an applicant under the Redress Scheme either through an application for redress or in response to a request for information made under section 24 or 25 of the Redress Act.

For instance, the application form for redress currently requests that applicants provide as much identifying information as possible about each institution that is responsible for bringing the applicant in contact with the person or people who sexually abused them.

However, there may be circumstances where an application does not provide sufficient information to identify an entity. For example, this could occur because the sexual abuse occurred a long time ago. In those circumstances, the Operator of the Redress Scheme may request that the applicant provide further information under section 24 of the Redress Act. In responding to that request, the applicant may provide sufficient information to identify an entity as being involved in their abuse. Information that is provided in this way is captured by this governance standard.

Similarly, information provided by an entity that has already joined the Redress Scheme (that is, a participating institution in the Redress Scheme) that identifies another entity as being involved in abuse of the applicant is within the scope of the governance standard if that information is provided in response to a request by the Operator under section 25 of the Redress Act. This could occur where an applicant mistakenly identifies a participating institution as being involved in the abuse, the Operator requests information from the participating institution as required under section 25 of the Redress Act, and the participating institution provides information that helps to identify the entity that was involved in the abuse of the person.

The relevant application for redress does not need to be valid under subsection 19(2) of the Redress Act. For example, if the application does not specify where the applicant lives, but identifies a registered entity as being involved in the abuse of the applicant, that entity would need to take reasonable steps to join the Redress Scheme to comply with governance standard 6.

In practice, officers of the Redress Scheme will notify registered entities that are not participating non-government institutions that the entity has been identified in an application or in response to a request under section 24 or 25 of the Redress Act. This will allow the registered entity to start taking steps to comply with the new governance standard. Such a notification would be given to the affected entity as soon as practicable after it is identified.

Additionally, a registered entity that is likely to be identified as being involved in the abuse of an applicant for redress under the Redress Scheme will need to take reasonable steps to join the Redress Scheme. This could include for example, registered entities that were named in the Royal Commission into Institutional

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Responses to Child Sexual Abuse but may not have been identified so far in redress applications.

The inclusion of these factors in the new governance standard ensures the standard applies to as many registered entities that may be responsible for past institutional child sexual abuse as possible.

Taking reasonable steps to become a participating non-government institution

As with the existing governance standards, the steps that are reasonable to comply with the new governance standard are to be determined objectively and will depend on the specific circumstances of the registered entity.

However, in all cases, it requires registered entities that have been or are likely to be identified as being involved in the abuse of an applicant for redress to ultimately become participating non-government institutions in the Redress Scheme.

Common steps a registered entity can take to meet the new governance standard may include:

- agreeing to participate in the Redress Scheme for the purposes of paragraph 115(3)(c) of the Redress Act, so that the entity can become a participating non-government institution within six months of the relevant redress application relating to the entity being made or within six months of the entity being identified in a response to a request for information under the Redress Act; and
- actioning requests made by officers of the Redress Scheme relating to the entity's participation in the scheme without delay.

The six month period is expected to be a reasonable period for most entities to become a participating non-government institution, provided these entities engage early with officers of the Redress Scheme and do not delay the on-boarding process.

The object

The object of the governance standard is to maintain and enhance public trust and confidence in the Australian not-for-profit sector by ensuring that a registered entity's governance enables it to be accountable for its past conduct relating to institutional child sexual abuse. This is linked to the objects of the Act and the matters the Australian Charities and Not-for-profits Commission (ACNC) Commissioner must consider in exercising their powers under the Act.

In particular, the object of the governance standard promotes the objects of the Act by giving the public confidence that registered entities manage their affairs accountably and transparently, use their resources effectively and efficiently, and pursue their charitable purposes.

Additionally, the governance standard takes into account the unique nature and diversity of not-for-profit entities and the distinctive role they play in Australia. As these entities are given funding, exemptions, concessions and benefits from governments and donations from members of the public, it is appropriate that they have some level of accountability to the public about their actions and meet

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community expectations in relation to governance. This includes the actions of these entities and relevant community expectations about how these entities are accountable for their past conduct relating to institutional child sexual abuse.

Failure to comply the governance standard

Officers of the Redress Scheme and the ACNC will share information to ensure the new governance standard can be effectively administered by the ACNC Commissioner.

Consistent with existing governance standards in the *Australian Charities and Not-for-profits Commission Regulation 2013*, failure to comply with the new governance standard means that the entity is not entitled to be registered under the Act. This enlivens the ACNC Commissioner's power to consider revocation of the entity's registration, and if the ACNC Commissioner exercises this power, the entity would no longer be eligible for certain government funding, exemptions, concessions and benefits.

Alternatively, if the entity is a federally regulated entity, a failure to comply with the new governance standard may result in enforcement action being taken by the ACNC Commissioner under Chapter 4 of the Act. This could include for example, issuing formal warnings and giving directions relating to actions required to comply with the governance standard.

Additionally, a failure to comply with the new governance standard may be a significant matter that must be reported to the ACNC Commissioner under section 65-5 of the Act. An administrative penalty applies for failing to give the ACNC Commissioner such a notice within the required time.

These options give the ACNC Commissioner sufficient flexibility to pursue the most appropriate action in each case, depending on their assessment of various considerations, including the severity and nature of the failure. These options are also consistent with the existing options that apply for a failure to comply with the existing governance standards.

Application

Item 3 provides that these amendments apply in relation to applications for redress made under the Redress Act before, on or after the day the amendments commence. This means new governance standard 6 will apply to registered entities irrespective of when the relevant application for redress is made.

This ensures that the amendments apply to as many registered charities that may be responsible for past institutional child sexual abuse as possible.