

**Guide to Memorandum of Understanding**

Moores/Missions Interlink

2019



**Introduction**

The External Conduct Standards (**ECS**) apply to collaborations with third parties (and their partners) for overseas activities. This includes sending funds overseas, co-delivering programs, some international peak body memberships and other one off or longstanding partnerships.

Charities are required to take “reasonable steps” to monitor overseas activities, not only of third parties, but organisations that those third parties partner with as part of the collaboration. This places charities in the position of attempting to impose obligations on organisations with whom they collaborate.

Except in the case of minor overseas operations, the most straightforward way to impose obligations on a third party will usually be through a written agreement. A Memorandum of Understanding (**MOU**) (rather than a contract) is usually sufficient, as contracts will be difficult or impossible to enforce against third parties in most overseas jurisdictions. For this reason, the main purpose of an MOU is not to assist a charity to enforce terms when things go wrong – instead, it clarifies the charity’s expectations of the third party and allows the charity to demonstrate that it has taken steps to comply with the ECS.

The **attached** template MOU imposes ECS related obligations on third parties and allows for regular reporting on activities. Using the template MOU may be a reasonable step to help your organisation meet the ECS, but is not the only step. Your charity may need to take further steps to ensure third parties understand the requirements of the MOU and the ECS and actively monitor programs overseas. Your organisation will also still need to ensure its own internal processes and procedures comply.

**Using the template**

The template MOU is designed to be a flexible document that suits the widest number of potential programs. You will need to read the document carefully and consider whether it is appropriate for your programs. You may need to make amendments to suit your organisation. The ECS are principle based – each charity must assess their specific circumstances and risks, and take reasonable steps based on that assessment. There will be portions of the template MOU that might not be relevant to your organisation – for example your overseas program or collaboration may not involve any equipment. If that is the case, remove the irrelevant section.

Some organisations that have exceptionally high risks or complicated partnerships should seek legal advice on whether the template MOU meets your needs.

When using the MOU please note:

* Spaces highlighted yellow require your organisation’s input and consideration. For example, you will need to complete details of the collaboration, as well as the term of the MOU.
* As far as possible, we have drafted the document using plain language rather than legal language. Due to MOUs and overseas agreements generally not being enforceable in court, it is more important to be clear than to cover off on all legal technicalities.
* The MOU includes pictures and explanation boxes for the third party. This is in recognition that third parties may not speak English as a first language, understand Western legal systems or enter into these types of agreements regularly.
* If you are operating in areas where English is poorly understood, in may be worth considering having the document translated to ensure your partners understand it clearly.

**Comments on specific clauses**

**Parties**

Include the full names and addresses of your charity and the third party. You can use a shorthand or acronym under the full name if preferred.

**Background**

The Background section summarises the two parties and their collaboration. You will need to complete details about your charity, the third party and the joint program. Be sure to define your collaboration as “The Program” for consistency throughout the document.

Example:

*A Mission Incorporated is an Australian not-for-profit organisation and registered charity with the Australian Charities and Not-for-profits Commission (****ACNC****). Missions Incorporated’s purpose includes the advancement of religion*

*B International Church is a charity registered with the Indian government which works to proselytise in remote areas of India.*

*C Mission Incorporated and International Church are collaborating for the purposes of delivering a program in Kongthong in the northeast of India (****the Program****).*

**Objectives of program – Charity to complete (Clause 1)**

The objectives are an important part of the MOU, as it sets out what is (and is not) within the scope of the program. The objectives should be a more focused application of your charity’s purpose and should fit under the “umbrella” of that purpose. Well drafted objectives help you to comply with ECS 1 – ensuring your activities outside Australia are carried out in a way that is consistent with your purpose. Elsewhere in this MOU, the use of funds and resources is restricted to furthering these objectives.

**Key responsibilities – Charity to complete (Clauses 2 and 3)**

Describe what role and responsibilities your organisation has in the delivery of the program. This might include financial support, providing staff, training, sending resources, or delivering services.

Similarly, describe the role and responsibilities your partner has in the delivery of the program. Consider delivery of services, finances, access to stakeholders and providing staff and volunteers.

**Use of resources (Clause 4)**

This clause assists you to meet the requirement under ECS 1 to take reasonable steps to ensure that resources given to a third party outside Australia are used in accordance with your charity’s purpose and character as a not-for-profit entity.

**Controls and risk management (Clause 5)**

ECS 1 requires you to ensure third parties have reasonable controls and risk management processes in place, particularly in relation to protecting funds. Depending on the level of risk, your Board may consider asking third parties to provide evidence of these controls and risk management processes – this possibility is allowed for at clause 5(b).

**Use and storage of equipment (Clause 6)**

A reasonable step in response to ECS 1 and 3 may involve protecting valuable equipment from theft, loss or use for the wrong purposes. You can set a threshold value for equipment to be listed in a Register in the Definitions section. You can also add individual items to the Register in the Schedule if you have already supplied equipment or know what equipment will be supplied.

If your program does not involve the supply of equipment, you can delete this clause, the definition of equipment and the Schedule with the Register of Equipment.

**Whistleblowing and complaints handling (clause 7)**

Whistleblowing and complaints relates to ECS 1, 3 and 4. It is an important tool for exposing wrongdoing within an organisation so it can be addressed. This clause requires third parties to work with you to establish a clear, documented and published process for concerns to be raised by individuals within the organisation (I.e employees, volunteers) and outside (participants, beneficiaries).

Depending on the risk level, you may simply ask third parties to confirm that they have a process, or you may ask for evidence of this process. If risk is particularly high, it may be appropriate to develop the process alongside the third party and incorporate provision for whistleblowers to raise concerns or complaints directly with your charity.

The record keeping clause (12) addresses this further.

**Conflicts of interest (clause 8)**

The ECS imposes obligations around identifying and documenting conflicts of interests at all levels of program delivery – including third party conflicts of interest. This clause requires the third party to understand and disclose any conflicts of interest. They are also required to take steps to manage conflicts of interests so decisions relating to the program are not affected.

The record keeping clause (12) addresses this further.

**Protection of vulnerable individuals (clause 9)**

Protection of Vulnerable Individuals is increasingly of concern in overseas programs. This clause is particularly relevant for organisations that do not have a physical presence in their country of operation, given it is more difficult (but still expected) to protect Vulnerable Individuals. Depending on the level of risk, the sophistication of your third party and the local safeguarding culture, it may be necessary to offer additional tools or training to assist third parties with this requirement.

**Screening and background checks (clause 10)**

Screening and background checks are relevant to ECS 1, 3 and 4. This provision requires both You and the third party to ensure appropriate screening takes place. It may be appropriate to assess what screening is available in the relevant jurisdiction (recognising that many areas have no police or working with children checks) and to provide guidance on your expectations to your third party.

**Extraterritorial legislation (clause 11)**

The ECS requires charities to comply with Australian Laws that have extraterritorial application.

This is a difficult obligation to impose on a third party because they may not be subject to the laws themselves, and the length and complexity of the laws makes them difficult to explain in a clear way. This clause operates in two ways. It requires acknowledgement that some Australian Laws have extraterritorial application, and that the third party will provide your charity with the relevant information to demonstrate compliance with the laws if asked.

The record keeping clause (12) addresses this further.

**Record keeping and reporting (clause 12)**

This clause covers record keeping and reporting. It will assist your charity to monitor (and demonstrate that it is monitoring) its third party’s activities. It will also assist your charity to comply with its own record keeping obligations.

Third parties are required to keep records relating to the program and clauses in the MOU, as follows:

* **Annual reporting** – this is the minimum information that your organisation requires to meet ECS 2. Reports could be more frequent (such as quarterly) if your Board considers this is necessary to manage risk;
* **Immediate notification** of events that could cause damage to your charity, the program or beneficiaries.
* Responding to **Information requests** from your charity – this is intended to give you flexibility to seek new or different information if and when you need it.

**Dispute resolution (clause 13)**

This simple dispute resolution clause allows (but does not require) the parties to attempt mediation.

**Amendment (clause 14)**

The MOU requires signatures of both parties to amend.

**Term (Clause 15)**

The Term of the MOU will depend on the length of your collaboration. Consider factors such as whether you would want to change the terms of the MOU or review annually, or have a longstanding agreement. Consider whether additional grounds for termination should be included.

**Relationship between the parties (clause 16)**

Because we are using an MOU and not a legal contract, it is important to be clear about legal intention – this way there is not an unintentionally enforceable contract created. This clause also discourages parties from purporting to represent the other party.

**Definitions (Clause 17)**

This section includes basic definitions so that the rest of the MOU flows better.