



Hands Off Our Charities alliance

Submission to Treasury re the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021*

18 March 2021

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Co-submitters



Alliance for Gambling Reform



Amnesty International Australia



Anglicare Australia



Asylum Seeker Resource Centre



Australian Centre for International Justice



Australian Conservation Foundation

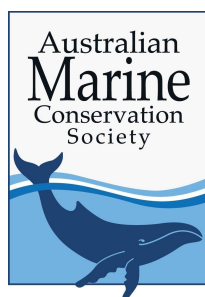


AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

Australian Council for International Development



Australian Council of Social Service



Australian Marine Conservation Society



Australian Unemployed Workers Union
(Greater Sydney)



Australian Progress



Bob Brown Foundation



Cairns and Far North Environment Centre



Communities Council of Australia



Community Legal Centres Australia



Country Needs People



Environmental Justice Australia



Foundation for Alcohol Research and Education



Foundation for Young Australians



The Fred Hollows Foundation



Friends of the Earth



Gecko Environment Council



GRATA FUND

Grata Fund



Greenpeace Australia Pacific



Human Rights Law Centre



Justice Connect



Oxfam Australia



People with Disability Australia



Public Health Association
AUSTRALIA

Public Health Association



public interest
ADVOCACY CENTRE

Public Interest Advocacy Centre



Queensland Conservation Council



RESULTS International (Australia)



Save the Children



Sunshine Coast Environment Council

The logo for Tearfund, featuring the word "tearfund" in white lowercase letters on a blue rectangular background.

Tearfund



Union Aid Abroad – APHEDA



Uniting Care Australia



Wide Bay Burnett Environment Council Inc

Executive Summary

The implications of the proposed regulations, which significantly broaden the scope of activities for which charities can be deregistered, will be felt by virtually every one of the 58,000 charities registered in Australia. The proposal is a major overreach and the need for further regulation has not been (and in our view cannot be) properly explained. No obvious benefit will accrue, yet there is a significant cost to charities and, by extension, Australian civil society.

The regulations will create uncertainty and impose a heavy administrative burden on charities. The uncertainty arises from the breadth and vagueness in the drafting, which cannot be cured by amendment. The heavy burden arises from the positive obligation placed on all charities to take undefined “reasonable steps” in relation to thousands of laws on the statute books, which will require the creation of a significant volume of policies, procedures, and document trails.

Further, the additional regulations will have a chilling effect on legitimate and lawful policy advocacy. Advocacy is protected by the *Australian Charities and Not-for-profit Commission Act 2012 (Act)*, and by Australia’s Constitution.

As charities, we take our responsibilities to the public very seriously and we want to be accountable to our communities and supporters. We have supported the role of the ACNC in ensuring that public confidence in the charity sector is maintained. However, we already face appropriate penalties for pursuing unlawful purposes and breaking the law. All these proposed regulations would do, is single out charities for disproportionate penalties following minor breaches of a kind that are unparalleled for any other group, including political parties and businesses.

Recommendation: That the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulation 2021* not proceed in any form.

Who is Hands Off Our Charities?

The alliance would like to thank Treasury for the opportunity to provide a submission on the exposure draft of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulation 2021 (proposed regulations)*.

Hands Off Our Charities (**HOOC**) is an alliance of over 50 charities, which formed in 2017 in response to a number of bills which would have silenced charities on issues of national importance. The HOOC alliance continues to protect the ability of community voices to be heard in national political debates. Together, the members of HOOC represent millions of Australians concerned with a wide range of issues including education, social welfare, human rights, animal welfare, the environment, health, climate change, disability rights and philanthropy. Our organisations, the issues we work on, and the communities we represent are diverse, but we all share a fundamental commitment: to serve the public interest.

Charities’ work is vital to the wellbeing of our communities

In a year like no other, our charities have been there for the Australian community. We housed families whose homes were destroyed by the bushfires. We supported people experiencing homelessness during the COVID-19 pandemic. Every single day we care for people with

disabilities, support people experiencing family violence, stand up for human rights and help protect our nation's endangered species.

Charities are the lifeblood of Australian civil society: there are over 58,000 registered charities in Australia, and in 2018 our sector accounted for over 8% of Australia's GDP. We employ more than 1.3 million people — that's 10% of working Australians — and many, many millions more people volunteer with us and donate to us every year.¹

What is being proposed

The proposed changes significantly expand the ambit of governance standard 3 in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (**ACNC Regulations**). Governance standard 3 currently says a charity must not engage in conduct (or omit to engage in conduct), where the conduct can be dealt with as an indictable offence under Australian law or has a fine of at least 60 civil penalty units (\$13,320). The *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (**2018 Review**) recommended the complete repeal of governance standard 3 because it “is not appropriate as a governance standard”. However, the proposed amendments would significantly expand it by:

- adding summary offences relating to property or a person;²
- adding a new requirement for charities to “take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity”. This will also apply to indictable and summary offences and offences with fines over \$13,320. “Resources” include funds, employees, websites, social media accounts and other publications.

These changes are important because under s. 35-10 of the Act, the Australian Charities and Not-for-profits Commissioner (**ACNC Commissioner**) is empowered to deregister a charity if they reasonably believe:

- i. a charity has not complied with a governance standard; or
- ii. it is more likely than not that the charity will not comply with a governance standard.

The ACNC Commissioner may decide to exercise other enforcement powers instead of deregistering a charity, which includes issuing a warning; issuing directions to do an act or refrain from doing an act;³ and suspending or removing one or more directors.

¹ Review of Australian Charities and Not-for-profits Commission (ACNC) legislation <https://treasury.gov.au/consultation/c2017-t246103>. See also Deloitte Access Economics Economic contribution of the Australian charity sector Australian Charities and Not-for-profits Commission November 2017 <https://www.acnc.gov.au/tools/reports/economic-contribution-australian-charity-sector> and Australian Charities Report 2013 <https://www.acnc.gov.au/tools/reports/australian-charities-report-2013>

² Note we have concerns that the FAQs published by Treasury have the potential to mislead readers in terms of how the summary offences are confined in their application. The actual wording is very broad and vague in its ambit.

³ Failure to comply with directions is a further offence: s. 85—30 of the *Australian Charities and Not-for-profit Commission Act 2012* (Cth).

The consequences for charities

If made, these proposed regulations would:

1. Impose a significant administrative burden on charities, forcing them to divert resources away from frontline service delivery and into unnecessary paperwork

In the *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018*, published in March last year, the federal Government stated its commitment to “ensuring charities face minimal red tape — freeing them to focus on serving the community”. In December last year, the Morrison Government announced its commitment to easing the cross-border compliance burden for charities.⁴ ACNC Commissioner Gary Johns has similarly claimed that reducing red tape is a priority for the ACNC.⁵

If made, these regulations will undermine these commitments by the Morrison Government. This proposal, made when charities are especially stretched in responding to a pandemic and recession, is very poorly timed.

These regulations would require charities to take all “reasonable steps” to ensure, not only that they and their staff will not commit minor offences, but that their resources will not be used to “promote or support” the commission of a minor offence by someone else. The proposed regulations are so broad and so vague that charities would have to seek legal advice to work out what steps are “reasonable”, and develop policies and implement processes in preemption of the possible breach by staff of many hundreds of laws. The fact that “reasonable steps” is not defined anywhere in the regulations, but rather left as a subjective determination by the ACNC Commissioner, makes compliance even harder.

This additional, significant administrative burden would force charities to divert precious resources away from service delivery to address these new layers of red tape which won’t benefit the communities we assist, or the broader community generally. The impact of this will be felt hardest by small charities with only very limited resources.

2. Stop charities from engaging in lawful advocacy in pursuit of their charitable purpose

Charities provide a vital vehicle for ordinary Australians to be heard in national debates. Every year, millions of Australians choose to make their voices heard on issues they care about by joining, donating to, or otherwise supporting charities. In addition, charities that work on the frontlines, for example, of climate change, domestic violence and homelessness, offer a wealth of expertise in public debate.

Sometimes, our advocacy may include supporting public actions to draw attention to pressing societal issues, be it marching against the death of Aboriginal and Torres Strait Islander people in

⁴ Frydenberg, J, Treasurer of the Commonwealth of Australia, and Seselja, Z, Assistant Minister for Finance, Charities and Electoral Matters, ‘Easing the regulatory burden on charities’, (Media release, 15 December 2020).

⁵ Johns, G, “Reducing Red Tape for the Charity Sector”, *Commissioner’s Column*, 6 August 2020.

custody, or rallying to demand the end of gender-based violence in Australian politics.

Many demonstrations are conducted lawfully, but given the abundance of potential minor offences that can be unwittingly committed at a protest, the proposed governance standard will make every appearance at, or statement in support of, a protest action an untenable risk to a charity's status. The proposed regulations place an extraordinary and unfair risk on charities for inadvertent breaches and actions completely outside of their control. The risk is so great that charities would be prevented from supporting important public interest advocacy on the most pressing issues facing our country. Further, the amendments would disproportionately impact charities that represent people who are locked out of traditional mechanisms for advocacy including media and lobbying, and are forced to rely on protest to communicate their calls for change.

Our ability to advocate on our issues, including when it relates to protest, is protected under the Act⁶ and by the Australian Constitution. The proposed regulations would undermine freedom of expression and would be, in our opinion, unlawful.

3. Single charities out for double punishment

This change would create an unprecedented regulatory system that singles out charities for punitive treatment. Neither for-profit corporations nor political parties can be deregistered for committing — or being deemed “likely” to commit — minor offences. Neither businesses nor political parties would accept such a threat of unfair, arbitrary treatment.

Charities, just like everyone else, have to comply with the law. These regulations add an additional, disproportionate penalty of deregistration on top of criminal penalties, including for very minor offences and a failure to keep adequate records.

4. Significantly broaden the ACNC Commissioner's already broad discretion to deregister charities, even when *no* prohibited conduct has occurred

Currently, the ACNC Commissioner can revoke registration if they reasonably believe a charity “is more likely than not” to breach a governance standard at some future time.⁷ This breadth of discretion is inappropriate — the current laws render the ACNC Commissioner a *de facto* enforcement and judicial agency for thousands of offences on the statute book. The proposed regulations will worsen this situation by broadening the basis upon which the ACNC Commissioner may exercise this discretion to include summary offences. This runs contrary to the ACNC's own current stated policy that it will “not investigate breaches of law or issues that other regulators or the police are better placed to handle”.⁸

Inappropriately broad discretion further arises because the impugned act need not be unlawful: it

⁶ Section 45-10(6) *Australian Charities and Not-for-profit Commission Act 2012* (Cth).

⁷ Subsection 35-10(1)(c)(ii) *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

⁸ Governance Standard 3: Compliance with Australian Laws, available at <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/3-compliance-australian-laws> \ (accessed 14 March 2021).

only needs to be an act that “*may* be dealt with” as a summary offence. The ACNC Commissioner will also be given the broad discretion of determining whether a charity has taken “reasonable steps” to satisfy the governance standard.

The proposed regulations further undermine the *Charities Act 2013* by turning the purpose test into an activities test

Charities, by law, exist to serve the public interest and to pursue our charitable purposes. Under existing law, we cannot operate for the disqualifying purpose of engaging in or promoting activities that are unlawful or against public policy.⁹

To be consistent with the *Charities Act 2013* (Cth) (***Charities Act***), charities should not be deregistered for committing an offence unless that offence demonstrates the charity’s ***purpose*** is unlawful. As much is made clear on the ACNC’s website: ¹⁰

“In order to determine the ‘purpose’ of a charity, the ACNC will look at the charity’s governing rules, its activities, any material published by the charity, and any other relevant matter. A ‘one-off’ activity is unlikely to demonstrate a purpose of promoting or engaging in that activity.”

These proposed regulations would further undermine the standard set by the *Charities Act* by exposing charities to deregistration for a single unlawful act, including an inadvertent act by an employee.

The proposed regulations are inconsistent with the most recent ACNC Review and add layers of uncertainty

The Explanatory Memorandum states that the changes to the regulations address uncertainty and implement the Government’s response to recommendation 20 of the 2018 Review.

However recommendation 20 suggested that funding be provided to the ACNC to litigate in order to clarify the law around the limits of advocacy by charities. It had absolutely nothing to do with governance standard 3 and/or charities committing summary offences.¹¹

It is a mistake to suggest the proposed changes to governance standard 3 are responsive to recommendation 20, particularly when Recommendation 9 recommended removing governance standard 3 entirely.¹² The 2018 Review stated the following:

⁹ Section 11 *Charities Act 2013* (Cth).

¹⁰ *Charity Advocacy*, ACNC website, available at <https://www.acnc.gov.au/advocacy-charities> (accessed 10 March 2021).

¹¹ P McLure, G Hammond, S McCluskey and M Turnour, *Strengthening For Purpose: Australian Charities and Not-For-Profits Commission Legislation Review 2018* (22 August 2018), 47.

¹² P McLure, G Hammond, S McCluskey and M Turnour, *Strengthening For Purpose: Australian Charities and Not-For-Profits Commission Legislation Review 2018* (22 August 2018), 47.

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. (emphasis added)

Governance standard 3 in its current form has also been criticised by respected charity law experts.¹³ The proposed changes add to, rather than address the concerns.

Conclusion

Charities are already prohibited from existing for a purpose of promoting activities which are unlawful or against public policy, and can be deregistered for committing more serious offences. The ACNC already has sufficient powers to enforce charity law. The proposed regulations are an unjustified overreach premised on a policy that is not backed by evidence. The proposed regulations are fundamentally flawed at a range of levels and should be abandoned.

¹³ Aroney, Nicholas and Turnour, Matthew, Charities are the New Constitutional Law Frontier (June 15, 2017). *Melbourne University Law Review*, Vol. 41, 2017 p458–460.