



18 March 2021

Not-For-Profit Unit
Not-for-profits and Tax Administration Branch
The Treasury
Langton Crescent
PARKES ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Treasury

Exposure Draft Consultation on Unlawful Activity – Changes to the Governance Standards for Registered Charities

1. This submission has been prepared by the Charities and Not for Profits Committee (**the Committee**) of the Law Council of Australia's Legal Practice Section.¹ The Committee welcomes the opportunity to make a submission to Treasury in relation to the Exposure Draft Consultation on Unlawful activity - changes to the governance standards for registered charities.

Executive Summary

2. The Committee is grateful for the opportunity to provide this submission to Treasury on the draft legislative instrument and explanatory materials for changes to governance standard three in the *Australian Charities and Not-for-profits Commission Regulation 2013 (the Regulation)* to expand the scope of activities that registered charities must not engage in or promote others to engage in (**the Proposal**).
3. The Committee notes that charities and people associated with charities such as directors, staff and volunteers are, like all people in Australia, subject to a myriad of laws that comprise summary and indictable offences. The commission of such offences ought to be dealt with under those laws and be subject to the penalties that apply under those laws.
4. The Committee submits that the Proposal imposes an unnecessary additional burden on charities and people associated with charities for the following reasons:
 - the Proposal overlaps with existing offences covering similar conduct which ought to be dealt with under laws relating to criminal offences including state, territory, and local government laws;
 - the range of summary offences throughout Australia is so broad that there will inevitably be unintended and disproportionate consequences of the Proposal;

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

- the discretion given to the Australian Charities and Not for Profits Commission (**ACNC**) Commissioner in respect of the offences that the Proposal extends to is an overreach inconsistent with the rule of law;
- the Proposal applies a standard of conduct and severity of consequence to registered charities only; the measures are not applied to other entities (including for profit entities and other not-for-profit entities (such as community groups, political entities etc. which are not registered charities but have concessional tax status) and the consequence is disproportionate to the conduct;
- the proposed review or appeal processes from the exercise of the ACNC Commissioner's discretions exercisable in relation to the Proposal are inadequate;
- the Proposal may inhibit legitimate public dialogue by registered charities or persons associated with registered charities to the detriment of Australian representative democracy;
- the Proposal is inconsistent with the recommendations of the expert panel appointed by the Minister to review the ACNC legislation;
- the Proposal is stated to address confusion, but the Committee submits it will add to confusion and uncertainty as to what acts of an entity are caught and what reasonable steps might be;
- there will inevitably be inconsistencies in how this is regulated by the ACNC which will add to confusion and uncertainty; and
- it will result in a significant increase of the regulatory burden on registered charities. They will need to understand the range of summary offences that could apply and determine what reasonable steps are required to comply with the proposed governance standard. It is for these reasons that the Law Council does not support the Proposal in its current form.

Summary of Proposed Measures

5. The Proposal seeks to amend the Regulation by:
 - substituting '*do an act or omit to do an act, if the act*' for '*engage in conduct, or omit to engage in conduct, if the conduct*';
 - adding certain summary offences to prohibited acts;
 - adding a duty for a registered charity to take reasonable steps to ensure that its resources are not used to promote or support certain acts or omissions; and
 - defining 'resources' widely.

Change in description of conduct

6. It is proposed that the wording of governance standard three be changed from '*do an act or omit to do an act, if the act*' for '*engage in conduct, or omit to engage in conduct, if the conduct*'. There is no explanation of the effect or intent of this change of words in the *Exposure Draft Explanatory Statement*.
7. Applying the principle of statutory interpretation that different words have different meanings, it is presumed that the intent of the provision changes with different words.²

² *Clyne v Deputy Federal Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 (7 August 1981).

If the intent is to distinguish a single act or omission from a course of conduct, the Committee submits that such an approach is inconsistent with the intent of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) having regard to the following provisions:

- Firstly, the matters that the ACNC Commissioner must take into account in deciding whether to revoke the registration of a charity. These matters include:

*the nature, significance and persistence of any contravention of this Act or non-compliance with a governance standard or external conduct standard (or any such contravention or non-compliance that is more likely than not) by the registered entity;*³

- Secondly, the requirement for the Commissioner to have regard to the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector;⁴
- Thirdly, principles to which the ACNC Commissioner must have regard in exercising powers and functions and in particular the following principles:
 - a) the principle of regulatory necessity;
 - b) the principle of reflecting risk; and
 - c) the principle of proportionate regulation.⁵

8. It would be helpful to have an explanation in the Explanatory Statement as to whether the intention is to change the meaning, reflecting the content of the Minister's Press Release.⁶

Adding Summary Offences

9. The Proposal has the effect of adding summary offences as prohibited conduct for the purposes of this governance standard.
10. As Note 3 to the current governance standard three points out, while a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by governance standard three may allow the Commissioner to exercise his or her enforcement powers under Part 4-2 of the ACNC Act, following consideration of the matters mentioned in subsection 35-10 (2) of the ACNC Act.
11. It is submitted that the inclusion of serious offences in the governance standards meets the object of the standards to provide a minimum level of assurance that a charity meets community expectations in relation to how a charity should be managed.⁷ However, extending the 'trigger' for enforcement powers to summary offences is not properly a matter that goes to minimum standards of governance because the governors of a charity cannot be expected to exercise supervision over

³ *Australian Charities and Not-for-profits Commission Act 2012*, subsection 35-10(2).

⁴ *Ibid*, subsection 15-10(d).

⁵ *Ibid*, section 15-10(e).

⁶ Senator The Hon Zed Seselja, 'Charities Supporting Unlawful Behaviour Will Not be Tolerated' (Media Release, 13 December 2020) available at <www.financeminister.gov.au/assistant/media-release/2020/12/13/charities-supporting-unlawful-behaviour-will-not-be-tolerated>.

⁷ Regulation 45.1, *Australian Charities and Not-for-profits Commission Regulation 2013*, see also *Australian Charities and Not-for-profits Commission Act 2012*, section 45- 1.

all acts or omissions that could constitute a summary offence. It is submitted that the Proposal takes the governance standard outside the scope enabled by the ACNC Act.

12. This view is fortified by the Note to section 45-5(1) and Note 1 to section 45-5(2) of the ACNC Act which state respectively that the objects of the ACNC Act include supporting a robust, vibrant, independent, and innovative Australian not-for-profit sector and that the main consequence of failure to comply with governance standards is a loss of the entity's entitlement to registration.

Limit on ambit of relevant summary offences

13. The Proposal limits disqualifying summary offences to offences that relate to property or injury or impairment to an individual. However, it is difficult to identify summary offences that fall outside such parameters and accordingly, there is little effect in the purported narrowing of the ambit of relevant summary offences. For example, traffic offences may relate to both property and risk of harm to individuals.
14. The Committee notes that summary offences relating to personal property could encompass trivial matters that ought not be a trigger for loss of charity registration, and which registered charities should not, and indeed to an extent cannot, be expected to monitor and supervise to ensure compliance.⁸

Certainty in the Law

15. The Exposure Draft Explanatory Statement states that the Proposal will address uncertainty in the law as to how engaging in unlawful activities may affect an entity's entitlement to registration under the ACNC Act.
16. The Committee submits that the breadth of discretion given to the ACNC Commissioner, and the vagueness of the requirement of a charity to take reasonable steps to ensure that resources (including its employees) are not used to promote or support acts or omissions does little to create certainty in the law. The Committee considers that, on the contrary, it will create further uncertainty both for registered charities and also the Commissioner in exercise of their powers.
17. There is a vast range of summary offences captured by the Proposal. The scale and complexity of the activities of many registered charities, the need of registered charities to generate documented risk management policies for every conceivable summary offence on the statute books and internal training, may make it impossible for registered charities to comply with the requirements entailed in the Proposal. Legal requirements that are impossible to comply with are anathema to the rule of law.
18. It would be expected that the Commissioner will be faced with fairly exercising the wide discretion for enforcement in an environment of potential endless breaches with existing privacy provisions of the legislation curtailing any detailed explanation to assure the public that the discretion is being used consistently. Public confidence in

⁸ For example, see section 22 of the *Marketing of Potatoes Act 1946 (WA)* which prohibits anyone from selling, delivering, purchasing, or taking delivery of 50kgs (or what appears to be 50kg) or more of potatoes unless you are a member of the Potato Corporation or an authorised agent. See also Section 58B of the *Summary Offences Act 1953 (SA)*, where it is illegal to sell or hire any fridge or ice box over the capacity of 42.5 litres. The *Summary Offences Act 1953 (SA)* also prohibits asking for money in a public place and leaving a farm gate open.

the ACNC and charities would be undermined if a charity were removed from the register due to a charge and later acquitted by the Courts.

19. The additional steps that will be required under the Proposal will unfairly burden charities as the only entities subject to such conditions and sanctions. This is inconsistent with the Object of the ACNC Act 'to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'.⁹

Disproportionate Consequences

20. The Proposal puts registered charities in jeopardy of losing the status of a registered charity which, in many cases may jeopardise the very existence of a charity that relies on charitable concessions for viability.
21. In order that there be a breach of the proposed governance standards, there is no requirement for conviction for an offence. There is no requirement of being charged with an offence. There is no requirement that a relevant act or omission has yet occurred. It is sufficient that the ACNC Commissioner believes, on reasonable grounds that it is more likely than not that the charity will not comply with a governance standard.
22. Subsection 35-10(1) of the ACNC Act provides as follows:

Revoking registration

(1) The Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes that any of the following conditions are met:...

*(c)(ii) the registered entity has not complied with a governance standard or external conduct standard, **or it is more likely than not that the registered entity will not comply with such a standard;***
[Emphasis added]

23. Subsection 35-10(2) provides guidance as to matters that the Commissioner must take into account in deciding to revoke the registration of a charity.
24. This is an extraordinary discretion for the Commissioner to be able to revoke registration on the basis of a view that it is more likely than not that the registered entity might, in the future, breach the proposed governance standard.

Review or Appeal

25. The breadth of the discretion is exacerbated by the limited review or appeal mechanisms given the serious consequences of an adverse decision for the charity and the provision for immediate or retrospective revocation set out in section 35-10 of the ACNC Act and the fact that the Commissioner is only required to give the charity notice that its registration has been revoked within 14 days of such revocation.
26. There is provision for review of a revocation decision in section 35-2 of the ACNC Act which allows for an objection to the decision under Part 7-2. Part 7-2 provides for an objection to be decided by the ACNC Commissioner. That is, the ACNC

⁹ *Australian Charities and Not-for-profits Commission Act 2012*, section 15-5 (c).

Commissioner reviews his or her own decision. Part 7-2 also provides for a review by the Administrative Appeals Tribunal (AAT) or an appeal to the Federal Court.

27. However, it is established that an AAT appeal is not a 'merits review' but a review where the onus is on the charity to prove that the decision should not have been made or should have been made differently.¹⁰ The same onus applies on appeal to a court.¹¹
28. These matters were addressed by the Senate Standing Committee for the Scrutiny of Bills when it reviewed the ACNC Bill and expressed concern that:

...where the ACNC Commissioner exercises a discretionary power, it is not clear what is required to prove that the decision is wrong or should have been made differently.¹²

29. An expert panel was appointed to review the ACNC Act and submitted its report in May 2018: *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018. (the Review Report)*. The Review Report noted that:

The Commissioner should not have additional powers nor be subject to less judicial scrutiny than other comparable regulators. A court should be able to consider afresh (a de novo review) any decision made by the Commissioner.¹³

30. Further, Principle (g) of the Senate Standing Committee for the Scrutiny of Delegated Legislation's Guidelines notes that:

Where an instrument provides for discretionary decisions to be made, the explanatory statement should state if independent review of those decisions is available. If merits review is not available, this should be justified by reference to the Administrative Review Council's Guide: What decisions should be subject to merits review?¹⁴

31. The fact that an appeal is pending in relation to a decision of the Commissioner does not in the meantime interfere with, or affect, the administrative decision and any tax, additional tax or other amount may be recovered as if no appeal were pending.¹⁵ The Proposal could well lead to circumstances where the registered charity status of an entity is revoked on the basis of a decision of the Commissioner as to the likelihood of the commission of a summary offence and the act in question never occurs, is

¹⁰ *Australian Charities and Not-for-profits Commission Act 2012*, section 165-40. Referred to in *Waubra Foundation and Commissioner of Australian Charities and Not-for-profits Commission* [2017] AATA 2424 (4 December 2017) and *Women's Life Centre Inc v. Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 2019/6068 (12 March 2021).

¹¹ *Australian Charities and Not-for-profits Commission Act 2012*, section 170-10.

¹² Senate Standing Committee for the Scrutiny of Bills, 'Thirteenth Report of 2012' (31 October 2012) page 449.

¹³ Commonwealth of Australia 'Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review (2018)', 37.

¹⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, 'Guidelines, 1st edition' (2020), <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines>, see also <www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.

¹⁵ *Australian Charities and Not-for-profits Commission Act 2012*, section 170-25.

never the subject of a charge or, if charged, is not upheld by a court. In the meantime, the charity may become unsustainable and unable to re-establish.

Compatibility with Human rights

32. It is expected that the Explanatory Statement to all instruments should contain a statement of compatibility with human rights.¹⁶
33. No such statement is attached to the Exposure Draft Explanatory Statement. The Committee appreciates that such statements are not always included in consultations but submit that human rights are at the heart of this Proposal and ought to be considered in the Consultation Draft.

Recommendation of Expert Panel

34. The Review Report recommended¹⁷ that governance standard three be repealed on the following basis:

*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.*¹⁸

35. The Exposure Draft Explanatory Statement says that the Proposal implements the Government's response to recommendation 20 of the Review Report. Recommendation 20 of the Review Report relates to test case funding being made available to develop the law in matters of public interest. In response to this recommendation, the Government stated it would explore legislative options to address uncertainty in the law.
36. The Committee submits that the Proposal is not addressing uncertainties in the law considered by the Review Report which was in the context of charitable purposes of advocacy. The Proposal is extending the law relating to the grounds that a charity may be de-registered.
37. The concern of the Committee is that the Proposal directly contradicts a Recommendation of an expert panel appointed to consider these matters.

Constitutional Implications

38. The Revised Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012 (Cth) sets out the Constitutional basis for the ACNC Act. The Explanatory Memorandum explains that under Australian Constitution, the Commonwealth does not have any legislative power specifically to regulate the not-for-profit sector. As a result, different Commonwealth powers support different

¹⁶ All government and non-government Bills and disallowable legislative instruments within the meaning of section 42 of the *Legislation Act 2003* are in scope, see <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>>.

¹⁷ Commonwealth of Australia 'Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review (2018), Recommendation 9.

¹⁸ Ibid, page 47.

aspects of the ACNC Act.¹⁹ In particular, the taxation power, the communications power, and the corporations power. However, the Commonwealth does not have general power to deal with crime without a nexus to a Commonwealth power.

39. Additionally, the Proposal may offend against the implied freedom of political communication. It is likely to have a chilling effect on charities or persons associated with charities engaging in political communication such as protests.²⁰ In this regard, it is significant that in 2010, in *Aid/Watch Inc v Federal Commissioner of Taxation*, the High Court of Australia declared that political communication by charities is of public benefit because of its important contribution to the system of representative and responsible government for which the Commonwealth Constitution provides.²¹
40. Indeed, subsection 45-10(6) of the ACNC Act sets out an express prohibition against any regulation under the Act that prohibits lawful comment or advocacy in aid of the charitable purpose of the charity.

Political advocacy

(6) The regulations must not require an entity not to comment on, or advocate support for, a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

(a) the comment or advocacy furthers, or is in aid of, the purpose of the entity; and

(b) the comment or advocacy is lawful.

Conclusion

41. The Committee submits that the proposed amendment to ACNC governance standard three is unnecessary and cumbersome, is inconsistent with the objects of the ACNC Act and the powers of the Commonwealth, creates uncertainty in the law, is inconsistent with core rule of law values, provides inappropriate and poorly supervised discretion to the ACNC Commissioner and will constitute an unreasonable and unjustifiable burden on charities. For these reasons the Committee urges that the Proposal does not proceed.

¹⁹ Revised Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012, Paragraph 2.2.

²⁰ On the issue of implied freedom of political communication, the Committee supports the submission of Senior Lecturer Murray Wesson and Associate Professor Ian Murray of the University of Western Australia in this consultation.

²¹ (2010) 241 CLR 539.



Law Council
OF AUSTRALIA

Legal Practice Section

42. The Committee would welcome the opportunity to discuss this submission with Treasury. In the first instance, please contact Charities and Not for Profits Committee Chair, Jennifer Batrouney QC on jennifer_batrouney@vicbar.com.au

Yours sincerely

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