



ACFID Submission on proposed changes to ACNC Governance Standard Three

17 March 2021

Senior Advisor
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Not-for-profits and Tax Administration Branch
Treasury Melbourne
Level 16, 530 Collins Street
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Attention: Michael Atfield

Unlawful activity - changes to the governance standards for registered charities

Thank you for the opportunity to make a submission on the draft legislative instrument and explanatory materials for changes to Governance standard 3 (the standard) in the *Australian Charities and Not-for-profits Commission Regulation 2013*.

ABOUT ACFID

The Australian Council for International Development (ACFID) is the peak body for Australian non-government organisations (NGOs) involved in international development and humanitarian action. Our vision is of a world where all people are free from extreme poverty, injustice and inequality and where the earth's finite resources are managed sustainably. Our purpose is to lead and unite our members in action for a just, equitable and sustainable world.

Founded in 1965, ACFID currently has 131 members and 21 affiliates operating in more than 90 developing countries. The total revenue raised by ACFID's membership from all sources amounts to \$1.86 billion (2018-19), \$701 million of which is raised from over 1.26 million Australians. ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community-based groups, with a mix of secular and faith-based organisations.

These amendments, if enacted, will have consequences for ACFID, its member organisations and those who support them.

ACFID believes the proposed amendments to the standard as set out in the exposure draft represent significant regulatory overreach, adding to regulatory uncertainty and cost for charities. Accordingly, we recommend that these amendments be withdrawn.

The Exposure Draft Explanatory Statement (ES) states that:

The purpose of the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the Regulations) is to address uncertainty about when engaging in or promoting certain kinds of unlawful activity may affect an entity's entitlement to registration under the Act.

The stated purpose for the introduction of these amendments has not been met. These amendments instead act to unreasonably extend the powers of the Australian Charities and Not for Profits Commission (ACNC) Commissioner to revoke the charitable status of an entity. The discretion given to the Commissioner in respect of the proposed offences is an overreach and we argue inconsistent with the rule of law. The vagueness of the requirement of a charity to take reasonable steps to ensure that resources are not used to promote, or support acts or omissions does little to create certainty in the law and in our view adds to the uncertainty and increased regulatory burden of charities.

Further, these proposed amendments apply a standard of conduct and severity of consequence to charities that is not applied to other entities. The powers provided under Section 35 (10) of the ACNC Act 2012 allow the Commissioner to revoke the registration of a registered entity if:

*the Commissioner **reasonably believes** [emphasis added] that any of the following conditions are met:*

(c) (iii) 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;

There is no requirement for conviction for an offence, nor is there a requirement that a person be charged with an offence. There is no requirement that a relevant act or omission has yet occurred. It is sufficient that the Commissioner believes, on reasonable grounds, that it is more likely than not that the charity will not comply with a governance standard.

The discretion given to the Commissioner to form a view that a charity may, in the future, fail to comply with a standard, is extraordinary. The risk of regulatory overreach in a decision by the Commissioner to revoke the charitable status of an entity is only further enhanced by failure of the amendment to place proper limits around which summary offenses fall within the scope of the proposed extension of the standard.

While the proposed amendments seek to limit the breadth of power to revoke an entity's charitable status to only those summary offences that relate to property or injury or impairment to an individual, it is difficult to identify summary offences that fall outside such parameters and accordingly, there is little effect in narrowing of the ambit of relevant summary offences.

Finally, we regard the extension of powers under governance standard three to be at odds with the findings of the expert panel which undertook a review of the ACNC legislation. In the panel's report *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* it recommended¹ 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.²

The proposed amendments contradict the expert panel's findings rather than clarify any uncertainty with the regards to the operation of the standard.

¹ Recommendation 9 Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018

² Page 47 Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018

The amendments outlined in *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* are not fit for purpose and accordingly we recommend that these amendments be withdrawn.

Yours sincerely

Marc Purcell

CEO ACFID